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NORTH CAROLINA REPORTS.

VOL. 11.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

FOR DECEMBER TERM 1825 AND JUNE TERM 1826.

BY

FRANCIS L. HAWKS.

(VOL. IV.)

ANNOTATED BY

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Inasmuch as several of the volumes of Reports prior to the 63rd have been reprinted by the State with the number of the Report instead of the Reporter, and still other volumes will be reprinted and numbered in like manner, counsel will hereafter cite the volumes prior to the 63rd Reports, respectively, as follows :

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1 Murphey	"	5 "	1 " Eq.	"	36 "
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JUSTICES
OF THE
SUPREME COURT OF NORTH CAROLINA.
DECEMBER TERM 1825 AND JUNE TERM 1826.

JOHN LOUIS TAYLOR, *Chief Justice.*

JOHN HALL.

LEONARD HENDERSON.

JUDGES OF THE SUPERIOR COURTS:

JOSEPH J. DANIEL,

JOHN PAXTON,†

FREDERICK NASH,

JOHN R. DONNELL,

WILLIAM NORWOOD,

THOMAS RUFFIN,

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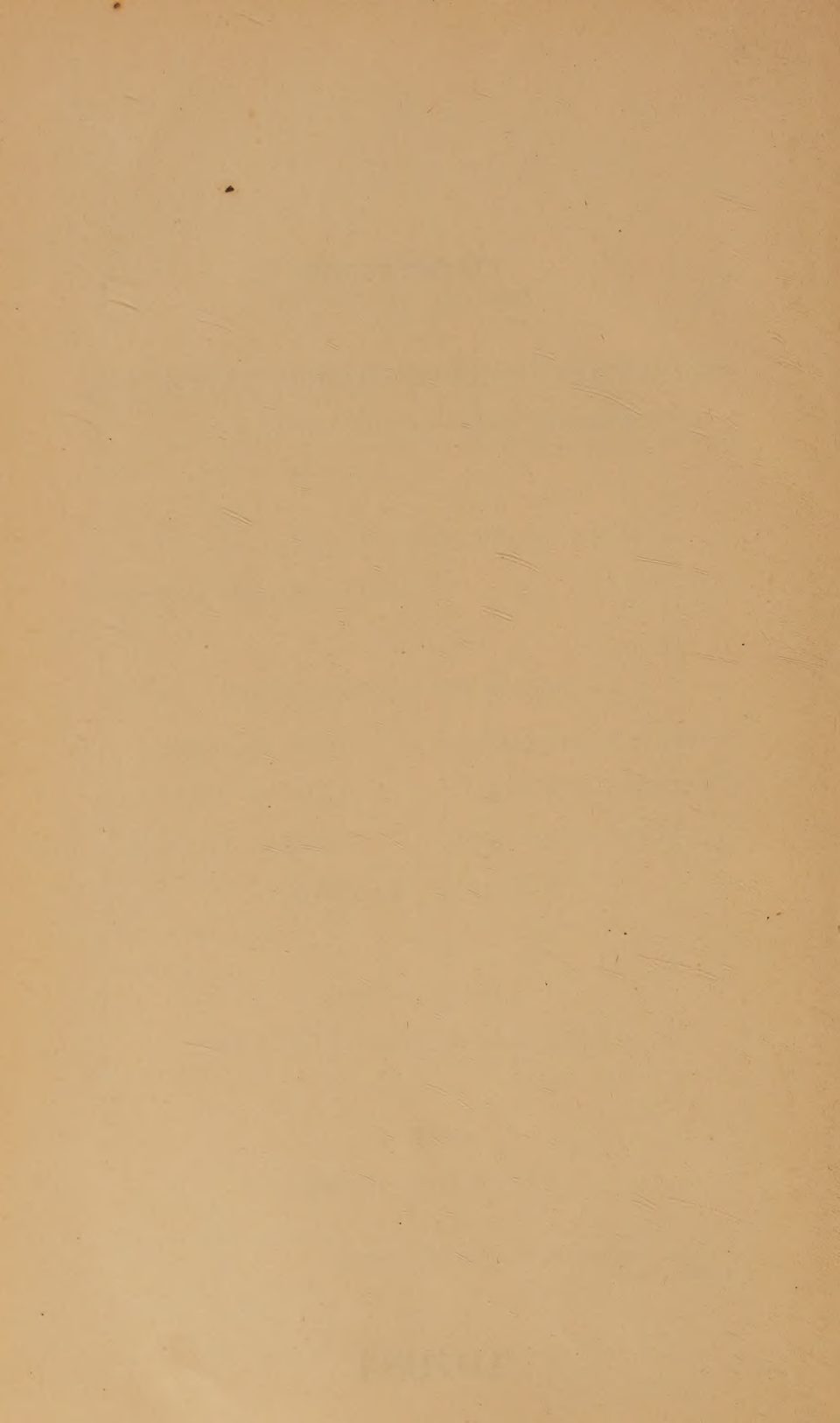
JAMES FAUNTLEROY TAYLOR.

REPORTER:

FRANCIS L. HAWKS.

* Appointed August, 1826, *vice* Judge Nash, resigned.

† Died November, 1826.



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CASES
ARGUED AND DETERMINED IN THE
SUPREME COURT
OF
NORTH CAROLINA.

DECEMBER TERM, 1825.

MATLOCK v. GRAY & HARPER.

From Rockingham.

When a sheriff levies, and advertises for sale, but in consequence of the payment of the debt to the plaintiff by the defendant in execution, does not actually sell, he is nevertheless entitled to his commissions on the whole debt, under the act of 1784.

When the plaintiffs in execution are administrators, who, after levy by the sheriff, suspend the proceedings under the execution, and subsequently receive the money from the defendant, without any sale by the sheriff, they are liable to the sheriff in action for his commissions, *individually*, and not as *administrators*.

The act of 1824, *ch. 3*, giving to the Supreme Court the power of amending extends only to such amendments as the court below might have made; and *it seems*, no *substantial* amendment will be allowed in the Supreme Court; because on such amendment the other party should have leave to amend his pleadings, and thus new issues are made which there is no tribunal to try.

This was an action on the *Case*, brought by the sheriff of Rockingham county, against the defendants as administrators of one *Solomon Parks*. The cause was tried below before PAXTON, Judge, and the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case. The defendants had recovered a judgment

(2) ment in Randolph County Court against *Samuel Hill*, and *William Hogan* his security, for \$9796, on which judgment a *fi. fa.* issued to the plaintiff, who was sheriff of Rockingham, and he levied the same on property of *Samuel Hill*, sufficient to raise the money due thereon, took it into his possession, advertised the sale, and gave

MATLOCK v. GRAY & HARPER.

notice thereof to the defendants in this case. *Harper*, in behalf of himself and *Gray*, wrote to *Hogan*, informing him that the arrangement which had been agreed upon between them (*Gray & Harper*, and *Hogan*), relative to the claim against *Hill & Hogan*, could be attended to by *Hogan*, who was going to Rockingham, without the trouble of attendance on the part of *Gray & Harper*: and the letter added, that no advantage would be taken of the sheriff (the plaintiff) should he postpone the sale, provided *Hogan* and the sheriff should make an arrangement whereby the judgment would be satisfied by a certain time.

The arrangement which was referred to in the letter as having been agreed on, was to this effect, that as *Hill* had gone to the South to raise money to satisfy the execution against himself and *Hogan*, the property might be purchased at the sale by *Hogan* without an actual advance of the money (in order to prevent a sacrifice) and the defendants were to indulge *Hogan* for the money.

Before the day of sale, *Hill* returned, and made a payment to *Hogan* of \$7,000. *Hogan* then wrote to the plaintiff, informing him that he was authorized by *Gray & Harper* to attend to the business relative to the execution, and directing him to suspend the sale, and return the *fi. fa.* with an endorsement that the sale was postponed by consent of plaintiffs. *Matlock*, on receiving this letter, did postpone the sale, and returned the *fi. fa.* with his levy endorsed; and afterwards *Hill* having paid to the defendants the sum remaining due, no other execution every issued.

Matlock applied to *Harper*, who was clerk of the court, as well as plaintiff in the execution against *Hill*, before the payment made by *Hill* to defendants, for a writ (3) of *ven. ex.* to make the debt and his commissions, and *Harper* as plaintiff, refused to issue the writ. At the time that *Matlock* postponed the sale, and returned the execution, he was ignorant of the fact that *Hill* had paid *Hogan* the \$7,000.

Hogan's only authority was contained in the letter of *Harper* before set forth; and after writing that letter, *Hogan* informed both *Gray* and *Harper* of the contents thereof, and they sanctioned what he had done.

Matlock brought this suit for his commissions on the amount of the judgment against *Hill & Hogan*, and on the

case as above set forth, the Court gave judgment for the defendants, and the plaintiff thereupon appealed to this Court.

Gaston, for the appellant — At the common law the sheriff had no fees; his right to compensation depends entirely on statutes. By 23 Hen 6. 20 pence is given for an arrest; by 2 and 3 Ed. 6. ch. 4. when sheriffs have no tallies of reward, they shall be allowed expenses, on petition; on a *capias ut legatum*, they have 20s. 4d. by statute. (*Jacobs, Verbo Sheriff.*) The statute which gives them poundage is that of 29 Eliz. ch. 4.; the words of it are, "shall not receive or take for the serving and executing any extent or execution upon the body, lands, goods or chattels more than," &c, and under this, it is settled in England, that if a sheriff levy an execution on body or goods to the amount, and the execution is stopped, becomes unavailing without his fault, or the parties settle, he is entitled to poundage. *Bingham on Judgments*, 226, 227. 5 Term R. 470. 6 Esp. N. P. Cases 111. 4 Burr. 1981.

It is also held, that he may have an action for them against the person for whose benefit he levied. *Bingham ut sup.* 1 Sellon 541. 1 Salk. 299. 2 L. Raym. 1212.

The statute which regulates poundage or commissions here is the act of 1784, ch. 223: its words are,

(4) "Sheriffs may receive for their services the following and no other fees, that is to say, for executing a warrant of distress, or execution against the body or goods, two and a half per cent." The only alteration which it makes in the English law, is in the quantum, and not in the nature of the duty, or in sheriff's right or remedy for collecting it. Accordingly, in these respects, the law has been here always held to be the same as in England. There is no *reported* case in North Carolina; but three not reported have fallen within my own knowledge. The first was the case of *Hamilton v. Moore*, in which the marshal of North-Carolina was allowed his commissions after levy, without sale. Another was a case of the Bank of the United States; the bank brought two suits, one against the maker, the other against the endorser of the same note; after judgment two executions issued, and the marshal, not knowing that they were for the same debt, levied both,

and commissions were allowed him on both. The last case was, *The United States v. Hoskins*; a judgment to a large amount was obtained against *Hoskins*, on which execution issued, and the marshal levied; afterwards, *Hoskins*, on settlement at the Treasury Department, reduced the debt to a very small sum, and the Chief Justice of the United States held that the marshal was entitled to retain commissions on the whole amount levied.

And such is the settled law in our sister states. *Hildreth v. Sands*, (*Caine's Rep.* 192.) *Adams v. Hopkins*, (5 *Johns. Rep.* 252.) *Scott v. Shaw*, (13 *Johns.* 378.) *Roswell v. Dingley*, (4 *Mass. R.* 411.)

It is remarkable that though our statute is in the same language with that of 29 *Eliz.* yet in our practice, the levy for the commissions has always been on the defendant's property, over and above the amount of the judgment: the practice in England was otherwise (1 *Sellon* 540), though by stat. 43 *Geo.* 3, it is now made conformable to our practice.

But that this practice of ours does not alter the (5) sheriff's claim on him for whose benefit he has levied appears from this, that the law is recognized as existing in England, since the statute, that the sheriff may go against the plaintiff for his poundage. *Bingham* 226, 227. And in Massachusetts, where the practice is similar to ours, the sheriff's claim is yet on the creditor, for the levy is to remunerate or indemnify him. 4 *Mass. R.* 411.

Badger, for the appellees.—1. That plaintiff is not entitled to commissions at all, because that service for which the act of 1784 gives the commissions, has not been performed.

The statute of 28 *Eliz. ch.* 4, is not, as supposed by the opposite counsel, like our statute.

By the former, the poundage is given upon the sum "that the sheriff shall levy, or extend and deliver in execution, or take the body in execution *for*." The word "*for*" is to be connected with "levy," as well as with "take the body in execution:" and then separating the expressions which point out the several services for which poundage is allowed, the sense of the enactment is this: poundage upon the sum that the sheriff shall levy for, or shall take and

deliver in execution, or shall take the body for. Levy is susceptible of two meanings: one is to raise or collect, as, "to levy a tax;" the other, to seize or take property in order to raise or collect money, as, "he levied the execution," "he levied on a slave." In this latter sense, the word seems to have been used in the statute; "levied for," that is, seized, taken or attached for; equivalent to "taking in order to sell for" the sum required. This is the first act done in executing a writ of *fiery facias*; and the act of *Eliz.* having given the poundage to the sheriff for this act, the English judges were bound to say that the sheriff was entitled if they obeyed the declared will of the legislature.

But our act of 1794 gives the sheriff his two and a (6) half per cent., not for *levying* under a *fi. fa.* not for seizing goods, but for "*executing* an execution against the body or goods." To *execute* a process is to perform what the process commands. But the command of a *fiery facias*, is, to make the money and have it in Court to satisfy the plaintiff. No mention is made of a levy. That is only an act done preparatory to the execution of the writ. The levy cannot be returned by the sheriff as an execution of the precept. He is required to make the money; and if he return any thing else, it is in the nature of an excuse for not obeying. If, then, a levy is not executing the writ, and the sheriff is entitled only for executing, how can a levy entitle him?

This argument will appear stronger by adverting to that part of the English statute which refers to proceedings under writs of *elegit* and *extendi facias*. The service for which the poundage is there given is expressed by "shall extend and *deliver in execution*." Under these writs the sheriff delivers the property seized *in specie* to the plaintiff, instead of converting it into money as under the *fiery facias*. To extend and deliver in execution, is consequently to obey fully the command of the writ, to do all that is required or permitted. It is *executing* the writ.

And it is held, that if the sheriff make an extent, and before the *liberate* a new sheriff is chosen, the new, not the old sheriff, shall have the poundage. (*Dalton Sh'ff.* 526.) Cited *Cunningham's L. D. verba* "Fees." But to make an extent is the first step in executing the *elegit*, &c., as a levy

is in executing a *fi. fa.* The *liberate*, or delivery of the property extended to the plaintiff, is its completion, as the payment of the money raised by the sale of the goods seized is the completion of the proceeding under the *fi. fa.* The extent and *liberate* together in the one case, and the levy, collection and payment in the other, are an execution of the process. I infer that, had the expression of the statute of *Eliz.* been "*for executing,*" as in ours, instead of (7) "shall levy for," the construction of that statute in regard to a *fi. fa.* would have been different.

Perhaps a reason may be found for the difference between the two statutes. In England, when the sheriff seizes goods under a *fi. fa.* he fixes and returns the value of the goods. For that value the defendant is discharged, and for that value the sheriff is answerable. He cannot sell under *this writ* for less, and, if he do, he is liable for the difference. Hence, by the levy, the plaintiff gains an advantage, and the sheriff incurs a responsibility not known here, where the officer must sell at auction for what the goods will bring. And thus in England, the compensation is given for making a levy *for* the debt; with us for executing the execution by collecting the debt. But whether this be the reason, or whether there be any, the difference between the two statutes remains. They are said, on the other side, to be exactly similar. So far are they from being exactly similar, that they differ as widely from each other as attempt from accomplishment, or commencement from completion. But further: our statute gives the commissions only for executing an execution against the body or *goods*. The case states that *property* was levied on, but not what kind; it may be *land*; it does not appear to have been goods; and therefore it does not appear that the plaintiff is entitled.

The opinions cited on the other side from 1 *Caine's Rep.* and 5 *Johns. Rep.* were constructions of a New York statute, which gives the poundage for "*serving* an execution." And in the latter case, *Thompson*, Judge, likens that statute to 28 *Eliz.* and grounds his opinion upon that resemblance. If, therefore, it has been shown that there is no such resemblance, but a marked difference, between our statute and that of *Eliz.* those decisions do not apply here.

The cases cited from 13 *Johns.* and 4 *Mass.* were where

the sheriff had fully executed an execution against the body of a debtor, and of course must have been entitled to this compensation if he ever could be. They do not at all affect the question now before the Court.

The service not having been performed, the plaintiff has no right to the commissions. But if that point is against us we contend,

2. That he cannot maintain an action for them. The settled practice in this State, since the act of 1784, has been, that the sheriff collects the commissions out of the defendant in addition to the debt, and this practice, universal and long continued, has settled the construction of the act. In this case the sheriff had levied; had the property in possession; might have sold or retained possession until he was paid. In the case cited by the other side from 4 *Mass.* the want of any other remedy is relied upon by PARSONS, Chief Justice, to show that the action was maintainable; and he says expressly, if the sheriff could have found property of the debtor, he should have levied his fees out of it, to indemnify the plaintiff in execution. In England, the sheriff had no other remedy but an action against the plaintiff in execution. Before the statute of 43 *Geo.* 3, he could not collect the poundage out of the debtor; it was a charge upon the plaintiff only; and as the statute gave a compensation for the service, and no other remedy was provided, it followed from necessity that the sheriff should have an action against him at whose instance the service was rendered, or else he must go unsatisfied.

If it be said, the sheriff was, in our case, prevented from selling by the defendants, we answer, first, that the fact is not so; the case shows only a permission to delay the sale if the sheriff pleased, not a command to forbear; and secondly, if there had been such command, the sheriff was not bound to regard it; he had a right to retain possession, and sell, unless his fees were paid; and it was his own folly to forbear.

3. If an action may be maintained at all, it must be against the defendants in the execution. *Hill & Hogan*. Their property was liable for the fees in addition to the judgment. They have been relieved by the suspension of the sale; *Gray* and the others have derived no benefit; they have neither collected nor retained

the commissions, and ought not to be made to pay them.

4. The defendants, if liable, are liable in their own right, and not as administrators. But the action is brought against them in their representative character, and if a recovery is effected it will be a charge upon the funds of their intestate. Yet clearly it was no debt or demand against the intestate. When it is said the action is against the defendants as administrators, reliance is not placed on the defendants being called administrators in the writ; that may be rejected or be considered a mere *descriptio personarum*. But the statement of the case which presents the questions to this Court, says, expressly, that the action was brought against them *as* administrators. If, then, they are not liable in that character, the plaintiff cannot have judgment in *this* action.

Gaston, in reply.—The first question made is, has the sheriff a *right* to the commissions? It seems to be conceded that this point is with the plaintiff; if the service required by our act of 1784, to entitle to commissions, be the same with that which in England give such a right. It is the same; the statute of *Eliz.* enacts, that “it shall be lawful to receive in recompense for serving and executing an execution or extent, twelve pence for every 20*s.* that he shall levy, or extend and deliver in execution, or take the body in execution for.” The act to be recompensed is “*serving and executing*,” the quantum is twelve pence on every 20*s.* “*levied* ;” and even if the phrase *levied*, be understood as meaning “taken in execution,” it is used not where the *service* is mentioned, but the fixing the quantum.

But the word *levy* is used in connexion with money not execution; and money levied, means in common (10) and legal parlance money *raised* or *made*. The word *levy* is defined by *Johnston*, to *raise* men, to *raise* money, to make war; and in law it signifies to collect or exact money. *Jacobs*, *Verbo Levy*. *Impey’s Shff.* 153. 1 *Caines* 195.

But it is contended that the last case cited is inapplicable, because the statute of New-York differs from ours. The words of the New-York law, are, “serving an execution for such an amount, such a per cent. on the sum levied.”

Now, *serviug* an execution, can mean nothing but performing the service which it commands, i. e. causing the money to be made; and the reason of the last proviso in the New-York statute is given by the court, "lest the sheriff might take poundage upon the sum contained in the body of the execution."

But it is objected that in England, the value of the goods taken is returned by the sheriff; here the value is ascertained by a sale. In the case before the Court, the jury have found that goods were taken to the value of the debt; and this same objection was made unsuccessfully to the claim for poundage in the case of an *elegit*. 2 *L. Raym.* 1212. Farther, here, as in England, if goods be taken to the value, the defendant is discharged, and the sheriff has precisely the same liability; nor is it true that in England, by a return of goods taken to such a value, the sheriff is charged with the debt. 1 *Sellon* 529, 530. 2 *Show.* 89.

The second question made is, can the sheriff, after taking goods in execution, maintain an action for his poundage, if the defendant pays the plaintiff? Under the statute of *Eliz.* it is plain that he may, but it is said to be otherwise under the act of 1784. A comparison of our statute with that of England will show that the compensation given by both is for the *same* service. Before our act of 1784 was enacted, by the English statute the sheriff was in the case but entitled to sue for his poundage; our act

only regulates the amount of commissions or quantum of poundage, and on every other point, the

English statute is still our law. It is, however, urged, that, as in England, on a judgment on simple contract poundage, is not collected from defendant's property, and as with us on all judgments it is, that therefore with us, the creditor is not liable for it to the sheriff. This is in effect to say, because the creditor may be *indemnified*, he shall *not* pay for services rendered, but if he cannot be indemnified he *shall* pay.

There cannot be found a decision, or even a dictum, to support this principle. It cannot be shown that, in England, the creditor is not liable, where (as in judgments for penalties) he gets his debt exclusive of poundage. The sheriff's right as against the plaintiff is not changed in England by reason of the statute 43 *Geo.* 3. *Bingham* 226;

and one of the decisions relied on, is since that stat. *Bingham* 226. 6 *Esp.* 111. The stat. 43 *Geo.* 3, was intended to give the *plaintiff* the costs of the execution. 2 *Taunt.* 175.

But it was said that the sheriff might have refused to postpone sale unless his commissions were paid, and that he may yet sell. If this be correct, it is no answer to our claim. He may do the same in England. *Bingham* 227. But if he was *then* entitled to demand his commissions, how has he lost the right since? The position, however, is not correct; the whole judgment, debt and costs, belongs to the *plaintiff*; he can release it altogether, and he alone has any control over it.

The statute of *Eliz.* and our own act, should be construed liberally for sheriffs. 2 *L. Raym.* 1212. *Cro. Car.* 286 1 *Salk.* 333.

It was said, that commissions were allowed by our statute only on sale of *goods*; that here it did not appear that the property levied on was not *land*. In our practice, no question was ever made but that the sheriff should have commissions, whether he sold land or goods. The

(12) last objection is to the form of action. The action is for services rendered to the defendants as administrators, for the benefit of the estate they represent, and plaintiff may charge them as promising as administrators. Had the sheriff in this transaction received what was due to them, they would have sued for it as administrators. 6 *East* 405. See *Chitty* 61. 3 *Wentworth* 71.

On a subsequent day *Gaston* requested of the Court to take into consideration the question, whether the objection to the form of action could be removed by an amendment under the act of 1824, *ch.* 3, giving to the Supreme Court power to amend proceedings in the County or Superior Courts.

TAYLOR, Chief Justice.—The act of 1784, which is the only one in force relative to sheriff's commissions, entitles them to two and a half per cent. for *executing* an execution against the body or goods. These expressions do not appear to me to warrant a different construction from that uniformly given to the words employed in the 29th *Eliz.* *ch.* 4, which are *levy or extend and deliver in execution*. These words were intended to apply to all the various exe-

cutions in England, by which the body, lands, goods or chattels might be taken; our act is confined to an execution against the body or goods. If upon a levy of a *f. fa.* the sheriff is entitled to commissions, though the parties compromise before he sells any of the goods, under the statute of *Eliz.*, it appears to me that he is equally entitled under our act. The case cited from 5 *Term* is a decision upon the very point, and it appears reasonable, that after a sheriff has been at the trouble of levying upon goods, and perhaps incurred the risk of taking care of them till the sale, he should receive his commissions, notwithstanding the compromise of the parties. It is stated in this case, that the sheriff levied, took the property into his possession, advertised the sale, and would of course have sold but

for the letter of one of the defendants. These acts (13) were all done for their benefit, and the final act of selling was waived by them, as they had a right to do. But the sheriff being ready to sell, and being prevented by the defendants from so doing, was equivalent as between him and them to an actual sale, and entitled him to claim his commission from them. I think that after execution had been suspended by the defendants' direction, and the debt paid, the sheriff would have no right to take out a *renditioni exponas* against the consent of the plaintiffs in the execution, to sell for his commissions merely.

The execution is under the control of the plaintiff, who had it in his power to provide for the payment of the commission, before he interposes to stop it; and if he neglect to do so, it is just that he should be chargeable with them. A contrary rule, it appears to me, might lead to great oppression.

Whatever doubt might be entertained as to the authority given by *Harper* alone to *Hogan*, yet I think there can be none when both the defendants sanctioned what he had done. This is quite equal to an authority given by both when the letter was written.

There is, however, an objection made to the form of the action, which must prevail. It appears from the writ that the defendants are sued as administrators, which cannot be done when they are liable in their own right. The cause of action and the implied contract arose after the death of

the intestate, and was occasioned by the personal act of the defendants. It would operate most unjustly towards creditors and next of kin, if administrators might burthen the assets with claims in which their intestate had incurred no responsibility; yet if a recovery is permitted in this action, the judgment will be in the first place against the goods of the testator, and the whole might be exhausted in discharge of that which the representative should properly answer in his own person.

The judgment of the Superior Court seems to have been rendered without any reference to this objection, (14) and solely on the question of law made in the case reserved; it ought, therefore, to be affirmed so far as the question relative to the form of the action is involved in it, and reversed so far as it relates to the question made in the case reserved. This is my opinion as to the proper manner of entering the judgment of this Court, under the act of 1818, s. 4, "that the Supreme Court may render such judgment as, on an inspection of the whole record, it shall appear to them ought in law to be rendered thereon."

HALL, Judge.—The act passed in 1784; *New Rev. ch.* 223, allows to sheriffs two and a half per cent. for executing a warrant of distress or an execution against the body or goods; and it is argued for the plaintiff that he is entitled to those commissions, because he levied upon the goods, and would have sold them, had the sale not been stopped by the defendants, who were plaintiffs in that execution; and in support of this doctrine *Alchin v. Wells*, 5 *Term*, and 1 *Caines* 192, are relied upon.

In the first of these authorities it was held that the sheriff was entitled to his fees when he levied upon the goods, under a *fi. fa.* though the parties compromised before he sold them.

This case is admitted to be law, but it is denied that the British statute, which allows fees to sheriffs, resembles our act of 1784. It may therefore not be amiss to compare them.

By the statute of the 28 of *Eliz. ch.* 4, it is declared that it shall not be lawful for any sheriff, &c., to receive or take of any person, &c., for the serving and executing of any extent or execution upon the body, lands, goods or

chattels of any person, &c., more, &c., than in this present act shall be limited and appointed, &c., that is to say, 12 pence for every 20 shillings when the sum exceeded not 100*l.* and 6 pence for every 20 shillings over and above that sum that he shall so levy or extend and deliver (15) in execution, or take the body in execution for. To make it more plain, I will read it thus: the sheriff shall receive for serving and executing an execution on goods, such and such fees, for such and such sums as he shall so levy. From this part of the statute I understand that the sheriff shall have fees in proportion to the sums which he shall *levy* or *raise* by serving and executing the execution. I think the verb *to levy*, here means *to raise*. I cannot allow to it the meaning here that is sometimes given to it by the context, when it is said, "that an execution has been levied upon property, but not sold;" in such case its meaning is more restricted. I therefore think the authorities relied upon are applicable to the act of 1784; and that under the circumstances of this case the plaintiff is entitled to his commissions. I think the law is founded in justice. The execution had been issued; was levied upon property which he was about to sell, in which event he would have received his commissions; the act he had undertaken to do was an entire one, was not devisible; and I think he is entitled to the whole of his commissions. If, therefore, the question depended upon the consideration of this part of the case, I should be for granting a new trial. But an objection is made to the form of the action, and that is, that the defendants have been brought into Court by summons as administrators, and no declaration has been filed laying the cause of action against them in their individual characters; and it was not known, until the trial came on and the evidence disclosed, that they were sued for an act done by them in their individual characters. The case made up and sent here was taken from the evidence, and discloses a cause of action against them in their individual characters, and we cannot give judgment against them in those characters, when the record shows they were sued as administrators; and we cannot give judgment against them as administrators for acts done by them in their own persons. When they stopped the farther progress of the execution in the hands of the

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(16) plaintiff as sheriff, they did not do it as administrators, but they did it in their individual characters, and they should have been sued accordingly.

With respect to the aid contemplated by the plaintiff to be derived from the act of 1824, *ch.* 3, by amending the proceedings, I think it is not to be relied upon.

In the first part of the 2d section of the act, a general power is given to the Supreme Court to amend from time to time the proceedings in either the County or Superior Courts. In the latter part of the section, it is restricted to such amendments as might have been made in the County or Superior Courts. Here the act is not very explicit; its words are broad enough to include all amendments that might have been made in a suit at any stage of the proceedings; but I am far from thinking that this Court possesses the power of making all such amendments by that act, but only such as the Court from which the record came might have made after final judgment rendered by it. It would be preposterous to say, that this Court could permit an amendment to be made which the Court from whence it came could not make. In the earlier stages of a suit, amendments might be made in either the County or Superior Courts; if they are not moved for until the suit has progressed farther on, it might not be proper *then* to permit them to be made. It certainly is not the meaning of the act, that this Court will suffer amendments to be made here, which the County or Superior Courts might have allowed to be made, in case application had been made at the proper time, but which after that time they ought not to have permitted to be made.

If then, after the trial of this cause in the Superior Court, it was too late to amend the proceedings, so as that the suit would stand against the defendants in their individual characters, this Court has not the power of doing it. It is to be regretted that the cause cannot be decided upon its merits; but this Court has no alternative, but must say that judgment must be given for the defendants.

HENDERSON, Judge.—I agree with my brother (17) HALL as to the construction of the stat. 29 *Eliz.* and our act of 1784; they both mean the same thing as to the sheriff's poundage on a *feri facias*, viz.: the actual

raising the money by the sheriff; the English authorities, therefore, on the construction of the English statute, are decisive of this question. They are founded on this plain principle, that when one person is engaged at the request of another in an act for which such other person is to compensate him, and he is prevented from performing the act, or discharged therefrom, by the person who employs him, it gives to him all the rights of an actual performance, where the act is not made up of separate and distinct parts; for the act being entire, the law cannot make it to consist of parts. Here the receipt of the money by the defendants themselves, rendered it impossible or illegal for the sheriff to proceed in his execution; he was thereby discharged from going on: and besides, the pressure of the sheriff is presumed to have caused the defendant in the execution to pay the money. As to the sheriff's going on against the debtor for the poundage, he has no authority to proceed for that, he not having levied any money on the execution, on which condition alone he could levy his poundage on the defendant; for the poundage is so much in the pound for the sum levied or raised, and I am considering this part of the case as if the defendant in an execution was liable for poundage. In England he was not liable, until the 43d of *Geo. 3*, and our laws are silent on the subject; but it has been the practice here since our act of 1784, and possibly before. How it commenced I am at a loss to determine; possibly from an act which subjects the party cast to the payment of all costs; but this was not considered as costs in England; the plaintiff paid it until the statute of *Geo. 3*. However, it is founded on practice, and the Court will not now disturb the practice.

As to the defendant's being liable to this action at the suit of the sheriff, I am at a loss for a principle to
(18) support it; the law implies no such engagement.

But I think that these defendants were liable in this case in their individual characters, and not as administrators. They cannot rightfully onerate the assets with this charge, which is the test by which the question must be tried. This is unlike the promise made by an executor, when the testator received the benefit, or when his estate received it, or when he endorsed a note or bill as executor; in such cases it is proper that the assets should be oner-

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ated. The Court should prevent the assets from being charged, unless for such claims as should protect them from the demands of others having claims upon them.

As to making the amendment under the late law, authorizing this Court to make such amendments on the records in the Courts below, when brought into this Court, as it may judge proper upon terms, I am wholly at a loss to conceive a case where it would be proper to exercise this power, for every amendment in substance, presents a different statement of facts, which the adverse party should have an opportunity of controverting. Every amendment in the writ or declaration (I mean substantial amendments), should be accompanied with permission to the defendant to amend his plea, and so permission to the defendant to amend his plea, should be accompanied with a permission to the plaintiff to amend his replication. How this Court, which is entirely a Court of errors in law, can make these amendments, I cannot conceive. How or where are the new issues of fact to be tried? If there are cases where we can exercise the power, I am satisfied that this is not one of them. However reluctantly, I am compelled to say that judgment must be entered for the defendants, for they are not liable as administrators.

Cited, Cannon v. McCape, 114 N. C., 580.

 (19)

GOODMAN'S ADMINISTRATOR *v.* ARMISTEAD.

From Chowan.

A subpoena is good which is tested in a certain year of American Independence, though the year of our Lord is not named.

This was a *sci. fa.* to the defendant as a defaulting witness, to which he appeared and pleaded, "*nul tiel record*, never summoned, prevented by sickness." The jury found the issues for the plaintiff, and the Court adjudged there was such a record, and gave judgment for plaintiff: whereupon defendant appealed to this Court.

The evidence that defendant was summoned was a subpoena, perfect in all its parts, and regular, save that the year in which it issued was not named; it being tested

“the 7th day of April in the XLV year of our Independence, Anno Dom. 182—.” This subpoena was returned by the sheriff “executed.”

Hogg, for plaintiff.

L. Martin, for defendant.

TAYLOR, Chief Justice.—The only objection taken to this subpoena, is the omission of the date of the year of our Lord, or rather, the omission of the unit figure; but as the forty-fifth year of the independence is inserted, there can be no difficulty in ascertaining the other period. In England, the year of the king's reign forms a part of the date, to which the year of our Lord is regularly and usually added; but if the latter were omitted, the year of the reign being a matter of so much notoriety, is considered sufficient always to supply the omission. The Court will always notice what is the year of our Lord, from a statement of the year of the reign; for where a deed was declared upon as bearing date the *26th August*, 13 Will. 3, and upon oyer, the date actually in the deed was *26th August*, 1701; it was held to be no variance, and (20) it must so be understood from the first date. (*2Ld. Raym.* 795.) The era of our independence is a more certain rule for the computation of time, than the year a king begins his reign, as being more familiarly known to the mass of citizens.

And as the year of our Lord may be ascertained by the year of the reign, so where the latter is omitted, it is sufficient even in an indictment, if the time be ascertained by other means. *Kelyng* 10, 11. Upon the whole, it cannot be doubted that this is sufficient evidence of the party being subpoenaed.

PER CURIAM.

Judgment affirmed.

Approved. *Cherry v. Woolard*, 23 N. C., 438; *Freeman v. Lewis*, 27 N. C., 91; *Merrill v. Barnard*, 61 N. C., 569.

GOVERNOR *v.* BARKLEY ET. AL.

THE GOVERNOR, to the use of Allen, *v.* BARKLEY and others.

From Northampton.

Before parol evidence can be given of the contents of a paper alleged to be lost, such loss must be satisfactorily shown. The *declarations* of the administrator to the person into whose possession the paper was last traced, that he could not find the paper among those of his intestate, is not sufficient proof of the loss, where the administrator is living, and there is no obstacle to procuring his testimony.

This was an action against the defendants as securities of a constable on his official bond. In making out the plaintiff's case, it became necessary for him to give in evidence a paper, or the contents thereof, which was traced to the possession of one *Wheeler*, who was since dead. To prove the loss of the paper, and to entitle the plaintiff to give parol evidence of its contents, he called a witness, *Stevenson*, who said that, by plaintiff's direction, he had called on *Boon*, who was the administrator of *Wheeler*, and requested him to look over *Wheeler's* papers for the one wanted; that *Boon* at the time was unwell, and produced a parcel of papers which he said were *Wheeler's*; that he, *Stevenson*, looked over some of these papers, and

Boon looked over some of them; that the witness (21) did not find the desired paper, and *Boon* said that he did not, but that he would look farther at another time. This witness also said, that in a conversation some time afterwards with *Boon*, he was informed by him that he had not found the desired paper.

It was admitted on the trial that *Boon* was alive, resided within a few miles of the court-house, and had not been summoned.

The Court, DONNELL, Judge, holding that *Boon* should have been produced, and that his declarations were inadmissible, would not permit parol evidence to be given of the contents of the paper. The plaintiff's counsel then directed a nonsuit to be entered, and moved for a new trial on the ground of the improper rejection of testimony. New trial refused, judgment and appeal.

HALL, Judge. —I think the Judge decided rightly in not suffering the plaintiff to give evidence of the contents of

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the paper writing, before he had better accounted for the loss of it, when he had it amply in his power to do so, by calling *Boon*, the administrator of *Wheeler*, into whose possession they had traced it. *Boon's* declarations ought not to have been received, when there was no obstacle shown to procuring his testimony as a witness; of course the rule for obtaining a new trial should be discharged.

The other Judges concurring,

Judgment affirmed.

(22)

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From Hertford.

Parol evidence shall not be received to contradict an acknowledgment in a deed of the payment of the purchase money.

Assumpsit on the express promise of defendant's intestate. The facts were, that the plaintiff, on the 28th of August, 1822. had executed a writing in the following words:

August 28, 1822.—Received of James Clay four hundred and fifty dollars, in full payment for two negroes, ——— and Dave her son, for which negroes, I do warrant and forever defend the right and title of said negroes, against all claim or claims whatsoever; and likewise do warrant them to be sound and healthy. Whereunto I put my hand and seal.

(Signed)

Thomas Spiers. [L. s.]

Witness, *G. M. Smith.*

Afterwards, the plaintiff and *Clay* being together, *Clay* called on a witness and informed him that he wished him to take notice, that the writing above was given under the following conditions, to wit: That *Clay* had loaned to the plaintiff \$100, and that *Clay* was about to go to Virginia; if on his return, plaintiff should pay the \$100, then plaintiff should retain the slaves named in the foregoing writing; but if he did not pay the \$100, then *Clay* was to pay plaintiff \$350 in addition to the \$100, and keep the slaves. *Clay* went to Virginia, leaving the slaves, and shortly thereafter died without returning; his administrator took possession of the negroes; and this action was brought for the \$350, on the express promise of *Clay*.

The presiding Judge, DANIEL, charged the jury, that the bill of sale under seal acknowledged the receipt of the purchase money of the slaves, and no parol evidence could be received to contradict it; that the parol evidence had been permitted to enable the plaintiff to show that the deed, or bill of sale, had been *fraudulently* obtained, and if the parties understood what they were about when (23) the writing was executed, and there was no actual fraud, then the acknowledgment of the payment of the purchase money could not be contradicted by parol evidence. The jury found for defendant, plaintiff moved for a new trial, which was refused, and from the judgment rendered, he appealed to this court.

L. Martin, for appellant.—The plaintiff having given his receipt for the consideration money under his hand and seal, the question is, whether a subsequent promise to pay it is a *nude pact*; or to state it in other words, can the payment of the consideration be inquired into by parol testimony?

That the terms of a contract committed to writing, whether under seal or not, cannot be added to, varied, or contradicted, by parol evidence, I admit to be clear at common law before the statute of frauds was passed; and this contract being for a slave, had not there been a memorandum in writing the contract could not have been enforced. But what part of this transaction is it, that we call the contract? Is it not the agreement in writing between the parties to transfer the title to the slaves for \$450? Can it be considered any part of the contract, in this sense, whether the consideration was paid down or is to be paid hereafter on certain conditions? Does it vary, add to or contradict any part of the instrument, technically called the contract, when parol evidence is permitted on inquiries into the consideration, whether paid or not? It has been adjudged that the consideration mentioned in deeds may be inquired into on parol evidence, by very high authority. In the case of *The King v. The Inhabitants of Scammoden* (3 Term R. 474), *L. Kenyon*, in giving the opinion of the Court, said, "It is clear that the party might prove other considerations than those expressed in the deed. It is permitted in all cases of covenants to stand seized to uses."

And his lordship refers to the case of *Filmer v. Gott* (7 (24) *Brown's C. Cas.* 70), which was an appeal to the House of Lords, as satisfactory authority to support him.

And there are sundry cases decided in New-York that support the position that I contend for in this case. In 14 *Johns. R.* 210, the case of *Shepherd v. Little* is in point. In that case the plaintiff had sold the defendant a lease, in the conveyance of which he acknowledged, under his hand and seal, that he had received the sum of \$500 "in hand paid." The recovery was resisted on the same ground it is in this case; but the Court decided that the plaintiff might introduce the evidence. And in the case of *Kip v. Dennison* (4 *Johns. R.* 23), the Court held, that where two trustees had executed a conveyance of land, in which was contained a joint acknowledgment of the receipt of the consideration money, that it was competent for one of the trustees to show that the whole of the money went into the hands of the other, and thus exonerate himself from liability.

We do not, in this case, attempt to contradict or vary or alter the contract, that is, that the plaintiff sold the slaves to the defendant for \$450; but we affirm this, and only offer to prove another instrument, not varient from it, relative to the consideration.

I have not been able to find any cases analogous to this; but I have found divers cases where a recovery on an *express assumpsit* has been effected, where the remedy has been suspended by statute, and where it has been suspended by stubborn rules of law.

Freeman v. Fenton (*Cowp. R.* 544), is a case where the remedy was suspended by statute. A bankrupt gave his note for a debt due the plaintiff before his bankruptcy, promising to pay, and although the recovery was resisted, it was enforced.

And where a debt is barred by the bankrupt's certificate, if he afterwards promise to pay it, it shall bind him; and it is sufficient in such case to declare on the original (25) consideration. 1 *Chit. Plead.* 40. *Besford v. Sanders*, 2 *H. Bla. R.* 116.

And in the case of insolvent debtors discharged, or debtors discharged under the Lord's act, their bodies are not liable

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to be taken in execution: but if, in either of these cases, the debtor after his discharge promise to pay the debt, he may be sued, or taken in execution upon such new contract, as in case of a bankrupt. 1 *Chit. Plead.* 42.

And the cases arising under the statute of limitations are familiar. Even the acknowledging the existence of the debt will revive the remedy under this statute.

The case of *Brockett v. Foscue* (8 N. C., 64), don't conflict with the principle I contend for. In that case, there was no express promise to pay the money: the case shows it was on an implied assumpsit. I think it was strange, after the plaintiff had released his debt, by which the defendant was discharged by an inflexible rule of law, that he should then contend to recover by an assumpsit that could only arise by implication of law.

But suppose this case comes so clearly within the principle of the case of *Brockett v. Foscue*, that the release may be conclusive evidence on the plea of the general issue, against the assumpsit for the balance of the price of the slaves; may not the plaintiff still recover on the ground of the new promise made afterward? and may not the having given the release without receiving the consideration money, be a sufficient consideration to support the promise?

Between partners, who have by deed covenanted to account with each other, and pay over what shall appear to be due, if they state an account and one expressly promise to pay the balance, assumpsit may be supported notwithstanding the deed. 1 *Chit.* 96. See also a note to 3 *Bos. & Pul.* 249.

Hawks, for appellee, —referred to *Brockett v. Foscue* (8 N. C., R. 64), and was about to examine how far a consideration was made out for defendant's promise, (26) when he was informed by Judge HENDERSON that it was unnecessary.

The CHIEF JUSTICE afterwards delivered the Court's opinion in these words: The affirmance of this judgment is of course under the case of *Brockett v. Foscue*, and the other adjudications of this Court to the same effect.

Judgment Affirmed.

Cited and approved. Shaw v. Williams, 100 N. C., 272.

DOZIER v. EXECUTOR OF SIMMONS.

DOZIER v. EXECUTOR OF SIMMONS.

From Currituck.

The distributees of A filed a petition against the administrator of A, and charged in the petition that B, one of the children of A, had been advanced by his father in his life time, and made him a defendant in the petition. In the County Court, a jury found that B had been advanced: B removed the proceedings by *certiorari* to the Superior Court, where, after reference to the clerk of the matters of account, the suit as to the petitioners was settled and disposed of; and so much of the case as related to the advancement of B was referred to arbitrators, who decided that B was entitled to receive a certain portion of his father's estate; and when this award was returned, on motion judgment was rendered for the sum stated to be due, in favour of B against the administrator, without objection:—*Held*, that the circumstances under which the judgment was rendered were such as made the judgment substantially just, as much so as if B had been one of the petitioners instead of a defendant; and as B had issued a *sci. fa.* to the administrator on this judgment, if the administrator had any substantial plea he might urge it against the *sci. fa.*

The distributees of *James Dozier*, deceased, filed a petition against *Mitchell Simmons*, as administrator of *Dozier*, for their shares of the estate. The petition stated, that *Enoch Dozier* (who was the plaintiff in this proceeding) was one of the distributees, and had been advanced by *James Dozier* in his life time, and he was made a defendant in the petition. *Enoch Dozier*, in his answer, denied the advancement; and *Simmons*, in his answer, expressed his (27) readiness to pay the estate to whomsoever the Court might direct. In the County Court, an issue was submitted to a jury as to the advancement of *Enoch Dozier*, who found that he had received by way of advancement \$524 60.

Afterwards, *Enoch Dozier* obtained a *certiorari*, and the proceedings were thereby removed into the Superior Court, where it was referred to the clerk to take a general account of *James Dozier's* estate, and when the account was taken, *Simmons* handed in his vouchers and they were allowed. There was no dispute as to the claim of the petitioners; and after the report of the clerk. the matter as to them was settled, and so much of the case as related to *Enoch Dozier's* interest in his father's estate was referred to arbitrators, who decided that *Enoch Dozier* was entitled to \$282

67. When this award was brought into Court, on motion, a judgment was rendered for that sum in favor of *Enoch Dozier* against the administrator of *James Dozier*.

There was no petition or cross bill filed by *Enoch Dozier* to have the benefit of the award before judgment was entered for the amount. On this judgment in favor of *Enoch Dozier* a *fi. fa.* issued against the goods and chattels of *James Dozier* in the hands of *Simmons*, his administrator, to which the sheriff returned that there was nothing to be found. *Enoch Dozier* then issued a *sci. fa.* to the executors of *Simmons*, who had died, calling on them to show cause why execution should not issue against the proper goods and chattels of *Simmons*: to this *sci. fa.* the defendants pleaded *nul tiel record*, with several other pleas, all of which were found by the jury in favor of *Enoch Dozier*; and on the plea of *nul tiel record*, the Court, DANIEL, Judge, presiding, was of opinion, that there was a judgment of record as the *sci. fa.* alleged; and although the entering up of the same had been somewhat irregular, yet it was not to be avoided by the present plea.

(28) The defendant then asked leave to file a petition to vacate or set aside the judgment, which the Court refused, and gave judgment that *Enoch Dozier* have execution against the proper goods and chattels of *Simmons*, in the hands of the defendants, whereupon defendants appealed.

L. Martin, for defendants.

1. I contend in this case, that the present plaintiff was a defendant only in the whole of the proceedings to which this suit refers; and that being a defendant, he is not entitled to a judgment or decree until he files a cross bill; because no party can recover of another, otherwise than according to the allegations in their complaint and proof of the facts alleged.

2. That the matters in controversy, on which the plaintiff obtained the *certiorari*, were wholly between the petitioners and himself, the said *Simmons* not being a petitioner.

3. That the matters referred to the arbitrators were wholly between the present plaintiff and the petitioners; and that the award did not, nor could not, effect *Simmons*

at all; *Simmons* not being, as to the points referred, a party litigant.

4. That *Simmons* was never made a party to the proceedings by *certiorari*, and had no interest in the matters controverted in it.

5. That there were two *fi. fas.* issued to make the money on the award; and that although the first was returned nothing to be found, yet the second one, issued for the same purpose, was set aside for irregularity, as appears on the record; and, therefore, could not lay a foundation for the *sci. fa.* in the present suit.

6. There was no such record as is recited in the *sci. fa.* on which to found the judgment rendered by the Court.

7. That when the plaintiff proceeds to recover by petition or bill in equity, then the defendants can show all facts necessary to their defence; but if he is allowed to proceed on the award, which the defendants contend (29) does not bind them, then the defendants are estopped by the award to contest the validity of the plaintiff's claim.

HALL, Judge.—I think the circumstances under which this judgment was entered, were as favorable to both parties, and answered the ends of justice between them, as well as if the person to whom the judgment was confessed had been one of the petitioners. 'Tis true he was a defendant in the original proceedings; but the subject matter of the petition had, by consent, been referred, and when the award was returned, the present defendant's intestate agreed that judgment should be entered against him for the amount awarded in his favor, and no objection was made by any of the parties interested in the distribution of the estate. I can see no objection to the judgment, more than if it had been confessed by the defendant in a more formal manner at any other time. If the present defendant has any plea to enter in his representative character, he might have done so on the return of the *scire facias*; but I think he is bound by the judgment confessed by his intestate, and that the judgment of the Superior Court should be affirmed.

The other Judges assenting,

Judgment affirmed.

STEDMAN v. RIDDICK.

STEDMAN v. RIDDICK.

From Gates.

A vendee or assignee cannot sue in his own name for property which the vendor or assignor, at the time of sale, could only recover by a suit.

TROVER for the value of a negro girl. On the trial below, before DANIEL, Judge, the plaintiff produced a bill of sale, executed by the defendant to one *Voight*, dated (30) 28th July, 1824, and a bill of sale from *Voight* to himself, dated 4th August, 1824, for the negro girl.

The subscribing witness to the last bill of sale deposed, that at the time of its execution, *Voight* informed the plaintiff that he did not have possession of the negro, nor did he know that he should ever be able to get possession of her again: that the defendant, before the date of the bill of sale from *Voight*, sent for the negro, and took her into his possession, claiming her as his property, and that she remained in his possession until defendant sold her to a person who carried her out of the state.

The Court instructed the jury, that if the defendant had the adverse possession of the negro, when *Voight* sold her to the plaintiff, then the plaintiff could not recover; *Voight* had but a right of action, which, if purchased by the plaintiff, would not enable him to maintain an action at law. There was a verdict for the defendant; and on the appeal of the plaintiff, the case here stood upon a rule to show cause why there should not be a new trial.

L. Martin, for appellant.—It is contended for the appellant, that this is not “a chose in action.” A chose in action is what cannot be reduced to possession by the act of the party, but by action only. *Terms de la Ley*.

As between the parties or privies to a contract for a slave, it is sufficient that there be either a bill of sale, or delivery. See *Bateman v. Bateman* (4 N. C., 85).

In this case, there were neither creditors nor purchasers having conflicting claims; but the defendant was a privy in estate to the contract, and estopped by his deed to set up any claim to the slave, or to make himself an adverse possessor.

In the case of *Morgan v. Bradley* (10 N. C., 559), it is decided by this Court, that when the purchaser and vendor of the chattel are ignorant of any adverse possession, the right of action passes.

See also the case of *Nichols v. Bunting*, to show that there is no maintenance in the transaction. (10 N. C., 86.)

B. Sumner, for appellee.—The signification of (31) the term, rights of action, or choses in action, is well settled and defined. It is not restricted merely to rights of action arising out of contracts, but it includes every case where a man hath the right to occupy, but hath not the occupation of a thing, but of which he may recover possession by a suit or action at law. (2 *Blackstone's Com.* 396, 397.)

“Where,” therefore, “a person’s deeds or goods, and consequently negroes, are in the possession of another, and he can only be restored to them by suit, he has a chose in action precisely to the same extent as if his demand arose from a bond or promissory note.” *Hynes v. Lewis’s ex’rs.* (1 N. C., 49. 2 N. C., 165.) These were precisely the circumstances of the case now before the Court: *Voight* claimed title to the negro, but *Reddick* had the adverse possession. *Voight*, therefore, had but a chose in action; and this he could not transfer to the plaintiff, so as to give to him a right to sue in his own name; for at common law no chose in action is assignable; nothing that lieth in action, entry or re-entry. (*Co. Litt.* 214 a.)

And the Courts of Law have adhered so strictly to this principle of the common law that they will not, even at this day, permit the assignee of a chose in action to maintain a suit in his own name; although the Courts of Equity will protect the assignment when for valuable consideration, if the assignee sue in the name of the assignor. (2 *Black. Com.* 442. *Co. Litt.* 211 a. 266 a. 1 *Bacon’s Abr.* 157. 1 *Term Report*, 26.) And so the presiding Judge instructed the jury.

But it is objected to the charge of the Court, that the defendant is estopped by his bill of sale to *Voight* to show that the plaintiff has not a sufficient title in law to enable him to recover. It would, perhaps, be difficult to find in any case an authority more precisely in point than the opinion delivered by Judge HENDERSON in *Moore v.*

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(32) *Willis* (9 N. C., 558) is in this case. The Judge there lays it down, "that an estoppel is the conclusion of the truth, and is therefore not to be favored. But it is the fact which the party is thus precluded from controverting, not the law. The party cannot be *estopped* from showing the law."

What right or interest the plaintiff acquired in the negro by his purchase from *Voight*, is inference of law, to be derived from the facts: the facts are, the defendant being in possession of the negro, *Voight* sold her to the plaintiff; the inference of law, that *Voight* had only a chose in action, which was not assignable; and this the defendant is not concluded by his deed from showing. But if the defendant's bill of sale to *Voight* could have operated against him as an estoppel, yet the plaintiff has waived his right to avail himself of it; "for estoppels must be pleaded relying on the estoppel." (4 *Reports* 53.) But in the case now before the Court, it does not appear that the estoppel was either pleaded or relied upon at the trial. If the plaintiff does not rely on the estoppel, the Court and jury shall not be bound by it; but the jury may find the matter at large, and the Court shall give judgment accordingly. (1 *Salkeld* 277. *Comyn's Dig.* "*Estoppel*," 77.) If the jury find the truth of the fact, the Court will give judgment accordingly with regard to the estoppel. (*Com. Dig.* "*Estop.*" 81.) And though estoppels conclude parties to deeds to say the truth, yet jurors are not concluded who are sworn *ad veritatem de et super præmissis dicendam*; for they may find any thing that is out of the record. (4 *Rep.* 53.) If a fact be stated in a deed which is not an essential part of it, the jury may find it different from what is stated, although the parties would be concluded to say otherwise: as if a deed bear date of a certain day and month, the jury is not estopped to say it was delivered on another day and month. (2 *Rep.* 6.) And so I apprehend, the jury may find that possession did not accompany the deed, although so expressed in the deed, or that the grantee had (33) subsequently lost and the grantor acquired the possession, for the delivery of possession is not an essential part of the deed.

TAYLOR, Chief Justice.—At the time when *Voight* sold

the slave to the plaintiff, the defendant had the possession, claiming it adversely against all the world; and the question is whether this chose in action is assignable, so as to enable the plaintiff to sue in his own name. For a chose in action comprehends specific chattels, as well as the right to recover a debt or damages, and extends to every sort of chattel property of which a man hath not the actual occupation, but a bare right to occupy it, and a suit in law is necessary to recover the possession, on account of an adversary claim.

The distinction in our law between choses in action and possession, corresponds with a similar one in the civil and canon laws, in which property in possession is termed *jus in re*, property in action, *jus ad rem*. It is a settled maxim of the common law, that no *chose in action* can be granted or assigned, founded upon the policy of preventing an increase of law suits, by restraining those who would not assert their own rights from transferring them to others of a more litigious disposition. The rule was doubtless more extensive than any mischief that could be apprehended; and it has accordingly been limited by various exceptions, as by the law merchant relative to bills of exchange, and in some instances *respondentia* bonds, by the acts making bonds and notes negotiable, and to the equitable sanction which is given to the assignment of choses in action for a valuable consideration. In many respects the rule at law is merely formal; for it is held that policies of insurance, and judgments, may be sued for by the assignee in the name of the original claimant. But I know of no authority for the position, that a vendee or assignee may sue for property in his own name, which the vendor or assignor, at the time of sale, could only recover by

(34) suit. It seems to me, that much of the mischief

which the rule aimed originally to prevent, would still arise under such a practice; and it is not called for by the necessity of trade or commerce, or any of those causes which introduced the relaxations. The case of *Morgan v. Bradley* (10 N. C., 559), was determined on its own peculiar circumstances; the steer was turned out in the range a very short time before the sale, at which time both the vendor and the vendee believed it to be still there, and when driven up by the defendant with his own cattle, he be-

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lieved the steer to be one of them. The possession at that time proceeded from mistake, and could scarcely be considered adverse. The judgment must be affirmed.

The other Judges concurring,

Judgment affirmed.

M'KELLAR, and the other Justices of Cumberland, to the use of Archibald Smith, John Smith and David Smith, v. BOWELL AND CAMPBELL.

From Cumberland.

The record of a recovery against a *guardian* is not evidence against his *securities*, in an action brought by the plaintiff in that recovery against the securities, to subject them upon the guardian bond for the default of their principal.

This was an action of *debt* brought against the defendants as securities to a guardian bond, given by one *Archibald Smith*, as guardian to those for whose benefit this suit was instituted. *Archibald Smith* died, and *John Smith* administered on his estate; and the guardianship was committed to another guardian, who filed a petition against the administrator of *Archibald Smith*, setting forth these facts, and charging that the administrator of *Archibald Smith* had in his possession the property of the wards: this petition was answered by the administrator, an account taken by order of Court, and a decree made against the administrator *de bonis intestati*, on which execution issued which was returned endorsed "no goods or chattels of *Archibald Smith*, deceased, to be found in the hands of *John Smith*, his administrator;" and now in this action on the bond against the securities, the plaintiff offered the record of the proceedings in the case of the petition, as *prima facie* evidence to charge these defendants with the amount of the same; but the Court refused it, on the ground that the present defendants were not parties to that suit. The plaintiffs were nonsuited, and the case stood before this Court, by appeal of the plaintiffs, on a motion to set aside the nonsuit, and have a new trial, because of the improper rejection of evidence.

Ruffin, for the appellant.—The question is, whether the

decree against the administrator of a deceased guardian is evidence against the sureties of the guardian, in an action upon the guardian bond. The record was rejected *in toto*; if it was evidence of any thing, therefore, the nonsuit must be set aside. Now these proceedings were evidence of a demand for settlement, and that there was no settlement; and if no settlement, there was a breach of the condition of the bond.

It may be said that this was *res inter alios acta*; the rule that excludes such evidence, however, is not universal; for instance, the conviction of a principal is *prima facie* evidence against the accessory; so one surety may bring his action against his cosurety, and the judgment against him is evidence, not of his suretyship, but of the amount recovered. *Foster v. Compton* (2 *Starkie's Rep.* 321). The rule is, that the surety is bound by the record, because he is bound for the acts of his principal; there is a privity between them. (6 *Johns. Rep.* 153. 7 *Ibid* 168.) This takes the cases as to suretyship out of the general rule, for instance, the cases of bail, and prison bound (36) bonds (4 *Mass. R.* 349); the case of a warranty also; the record in ejectment has by some been held to be plenary proof, and by all, to be proof of eviction, though it is *res inter alios acta*. *Somerville v. Hamilton*. (4 *Wheat.* 230.)

If this case comes within the reason of sundry exceptions, it must be made an exception also. A judgment against a sheriff for money collected by his deputy, is evidence in a suit by the sheriff against his deputy. (12 *Mass. R.* 163, 4. *M. & S.* 20.) A judgment against an executor is evidence for the executor in a suit by another creditor. Suppose a debt had been recovered against the guardian, could not the sureties have given that in evidence to protect themselves? The inventory of an administrator, the account current of a guardian, the answer of either would be evidence against the sureties. The sheriff is made chargeable by the return of his deputy, and his sureties by his own return. All these cases go upon the ground that the party is bound in consequence of the privity of contract.

Gaston, for the appellee. — Verdicts and judgments are evidence to establish the truth of the matters asserted by

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them, between parties and privies and them *only*; and they are then *conclusive*. (1 *Phill. Ev.* 222, 3. 2 N. C., 420. *Peake* 72.) The privies alluded to, are privies in blood, in estate, and in law. (1 *Phill.* 226. *Co. Lit.* 352 a & b.) and neither of these descriptions suit the defenants. *Outram v. Morewood.* (3 *East* 346.)

There cannot be found an English decision holding such testimony as this admissible. American decisions somewhat analogous may be found; but these *all* go upon the principle that where a claim is advanced against one who has a right to indemnify against it, notice given to the individual upon whom the right exists to come forward and defend, and a judgment enforcing the claim, make out a full case for relief. See 1 *Johns. R.* 517. 6 *Ibid*

(37) 159. 4 *Dall.* 436. 4 *Mass. R.* 349. 4 *Wheat.*

230. This principle is not to be found in the present case; but a new principle is set up, that a judgment against a principal debtor is evidence against a security, and that *without any notice to him*. This principle seems to be as repugnant to general legal notions as it is unsupported by authority; and though authorities against it ought not to be asked, yet perhaps they may be found. (1 *Term R.* 163. 14 *Johns.* 80.)

Curia adv. vult.

TAYLOR, Chief Justice —This is an action against the securities to a guardian bond, in which the question arises, whether the record of a judgment recovered against the guardian, in a suit brought against him alone, in behalf of the present plaintiff, is competent evidence against the defendants.

The general rule laid down by all the writers on the law of evidence is, that it would be unjust to bind a third person by a judicial proceeding between two, in which he could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous. A verdict or judgment, however, in a former action, upon the same matter directly in question, is also evidence for and against privies in blood, privies in estate, or privies in law, because their rights are derived under the person against whom the judgment is recovered, and must consequently be bound as his were.

Every reason assigned for the exclusion of such evidence applies with full force to this case; for there defendants had no opportunity of making a defence in the former action, of examining witnesses, or of appealing from the judgment; nor is there such a privity subsisting between them and the guardian as to form an exception to the rule. (1 *State Trials* 219. *Runn. Eject.* 364.)

The defendants entered into a joint and several bond, conditional for the faithful performance of the guardian's duty; but they have made no agreement, by the nature of their contracts, to be concluded by a judgment against their principal; they ought, of course, to be bound only upon the assignment and proof of a breach of the condition, in a suit against themselves.

If A binds himself to pay for goods sold and delivered to B, the admission of B as to the amount of the goods sold and delivered to him, is not admissible evidence in a suit against A. (5 *Espin.* 26.)

Nor, upon the same principle, could a judgment against B, founded upon his admission of the debt, be evidence against A. So if A and B be bound in a recognizance that B shall keep the peace, in another *scire facias* against A, he shall not be estopped by the first trial. (10 *Vin.* 464.)

Another rule of evidence intimately connected with the foregoing is, that no record can be given in evidence, but such whereof the benefit may be mutual, that is, such as might be given in evidence either by the plaintiff or defendant; or according to *Baron Gilbert*, that nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary. The reason why it would not be evidence *against* the party has been already shown. And it could not be relied on by a stranger to the former suit, even against the party to it, because if the person offering it had been a party instead of the person gaining the verdict, different evidence might have led to a different result; or it might have been gained by such evidence as would have been inadmissible if offered against himself. So that to admit a verdict as evidence under such circumstances, would be giving the party the benefit of evidence, which he could not avail himself of in his own suit. But this reason seems to apply only where the verdict is offered in evidence by a third person against the party who failed in

the former action, and not where it is produced against the party who succeeded. (1 *Phil.* 233.) It goes, however, (39) to show, that if the guardian had succeeded in the suit brought against him by the plaintiff, the judgment could not be offered by these defendants to repel the action; and, therefore, as the judgment was rendered against the guardian, it shall not be evidence against this defendant.

The cases relied upon to show that a judgment against one person is admissible evidence against another, not a party to the suit, are all, either within the literal terms of the exception or within its spirit, relative to privies.

The cases wherein the warrantee or covenantee of lands or chattels, have been allowed to give in evidence, against the warrantor, or covenantor, the judgment of eviction, or recovery against themselves, have proceeded on the ground of privity of contract; and most of them have been accompanied with notice of the suit, and either the warrantor did defend it, or might have done so, and employed the name of the defendant. Some of them have been decided on the principle that there was a covenant against eviction, which, therefore, as a fact, the party was at liberty to prove by the judgment, but he must still allege that the eviction was by a lawful title. In these cases, the covenantor was in fact, if not nominally, a party to the first suit, and might properly have been affected by the judgment.

In the case of *Rennerly v. Onpie*, cited from 2 *Douglas* 517, there was a verdict for the plaintiff, in an action of trespass, committed in the plaintiff's fishery, against one who justified as servant, and this was received *at nisi prius* as conclusive evidence against another defendant, in a subsequent action, for a penalty incurred by destroying fish in the same fishery. On a motion for a new trial, it was held only to be *admissible* evidence; but in a recent case, it is justly doubted, whether the record of the first suit was at all admissible in evidence, upon the subsequent action against the defendant, who was not a party to the former action. (2 *East* 366.) It is true that by our

(40) act of 1784, a judgment recovered against an executor by a creditor who seeks satisfaction out of the real estate, is made evidence against the heir, who is allowed at the same time to prove, if he can, that the execu-

tor has not fully administered. But this very provision shows that, in the opinion of the legislature, it was not admissible evidence upon common law principles.

The case of *Rip v. Brigham and others*, was cited from 6 *Johns.* 158. That was a contract for indemnity, and all these contracts stand upon peculiar grounds; "for if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money." Per *Buller J.* in 3 *Term Rep.* 374.

And the case in 6 *Johns.* was decided in conformity to this rule; for there the sheriff had taken a bond with sureties for the liberties of the jail, granted to a prisoner in execution, and a judgment was recovered against the sheriff for an escape, and it was held that the sheriff might, in an action against the sureties, give the recovery in the former suit in evidence, and that it was conclusive, and prevented the defendants from controverting the fact of the escape. But a very important fact in that case was, that regular notice of the first suit was given to the defendants, who assumed upon themselves the defence of the suit, and became essentially parties.

A case was cited from 1 *Ld. Raym.* 190, in which the declaration of an under sheriff was received as evidence against his principal; but the rule laid down in that case has been restricted by later cases, to declarations constituting a part of the *res gesta*. (1 *Campb.* 391. *Peake* 65. *Phil.* 76.)

It is remarkable in the case cited from 6 *Johns.*, the Court lay down the broad position, that the case of principal and sureties does not come within the rule of (41) *res inter alios acta*, for which *Pothier* is cited. But upon recurring to the work of that perspicuous writer, it will appear that although this position is correct in the civil law, it is so upon reasons and principles which have no existence in our law, and the total absence of which amounts to absolute demonstration, that the case of principal and sureties is within the rule of *res inter alios*

acta, according to the law we are now engaged in administering.

It was a rule of the civil law, that the obligation of the surety being dependant upon that of the principal debtor, the surety is regarded as the same party with the principal, with respect to whatever is decided for or against him. Therefore, if the demand against the principal has been dismissed, the surety may, in case he is afterwards proceeded against, oppose the exception, *sic judicata*, to the creditor. The creditor cannot in this case reply, that it is *res inter alios judicata*; for as it is the office of a surety, that his obligation depends on that of his principal, that the surety cannot owe more than the principal, and that he may oppose all the exceptions in *rem* which could be opposed by the principal; it follows, that whatever has been decided in favour of the principal, must be taken to be decided in favor of the surety, who ought in this respect to be considered the same party. And on the other hand, if the judgment was against the principal, the creditor may oppose it to the surety, and demand that it may be carried into execution against him.

This is the rule of the civil law, which, taken nakedly and without an investigation of the reasons on which it is founded, would clearly show, not only the admissibility of this judgment against the sureties, but also its conclusiveness. But the same writer proceeds to explain the reason of this rule, which is, "that the surety is allowed to appeal against the judgment, or to form an opposition to it, if it is in the last resort." (*Pothier on Obligations, Part 4. c.*

3. A. 5. s. 63.) No comment is necessary to show, (42) that it is precisely because these reasons have no existence in our law, that the case of principal and surety does not form an exception to the rule of *res inter alios judicata*. It is governed by the rule, and the judgment should be affirmed.

HALL, Judge.—It is a maxim in law, founded on the immutable principles of justice, that a person shall not be deprived of his property, or divested of his rights, without being heard in his defence. Privies are bound by judgments against their principals; but there is no departure from the rule in those cases, because their principals under

CHAIRMAN OF MECKLENBURG CO. CT. v. CLARK AND SPRINGS.

whom they claim were parties to such judgments. The present defendants are not privies to the defendant against whom the decree was made which is now sought to be given in evidence. They bound themselves as his securities, that he, as guardian, should deliver over all the estate to the person who was entitled to receive it; but not to pay the amount of any decree that might be made against him. The decree is not proof of an acknowledgment by the defendant to do it, of money or property in his possession to that amount, because it was made *in invitum*. It was made upon evidence offered by the petitioner with which these defendants were not confronted, and which they had not the opportunity (and if they had, they had not the right) of opposing or explaining by other evidence. The guardian and securities are not identified by similar obligations in the bond, but the securities bear an exact resemblance to each other, and it would not be pretended that a judgment obtained against one security would be evidence in a second action against another security. I, therefore, think the Judge properly rejected the decree in this case as evidence, and that the rule obtained for a new trial should be discharged.

HENDERSON, Judge, concurred.

Judgment affirmed.

Cited, Moore v. Alexander, 96 N. C., 34.

(43) CHAIRMAN OF MECKLENBURG County Court, to the use of
M'Bride v. CLARK AND SPRINGS.

From Mecklenburg.

The record of a recovery by the creditor of an intestate against his administrator, is not evidence in a suit by the creditor against the securities of the administrator.

This was an action of *Debt* on an administration bond, tried below, before NASH, Judge; and on the trial it appeared that *George Hampton* had been appointed administrator to the estate of *Thomas Henderson*, and entered into bond with the defendants as his sureties. *M'Bride*, a creditor of *Henderson*, had sued *Hampton* and recovered judgment, which was unsatisfied, *Hampton* being insolvent;

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and in this suit *M' Bride* was permitted to offer as *prima facie* evidence, the record of the recovery against *Hamp-ton*. The admission of this testimony formed the ground of a motion for a new trial; and defendants contended also that this action would not lie against them.

PER CURIAM.—This case presents the precise question that was made in *M' Kellar v. Bowers*, decided at this term. In that case the Superior Court rejected the evidence properly; in this case it was erroneously admitted. The judgment here must consequently be reversed.

Judgment reversed.

Cited, Moore v. Alexander, 96 N. C., 34.

(44) THE GOVERNOR *v.* HANRAHAN and others.

From Beaufort.

To an action on a sheriff's bond; the plea was, the act of 1810, barring suits on such bonds, if not commenced within six years after the right of action accrues; replication, a promise within three years. The replication is a departure from the declaration; for though the party promising may be liable in an action on the promise, yet the promise cannot restore the right of action on the bond; for to that, by the express words of the statute, lapse of time is a positive bar.

This was an action of *debt*, brought on the official bond of *Slade Pearce*, former sheriff of Beaufort county, against the securities to said bond.

The defendants pleaded the general issue, conditions performed, and the statute of limitations of 1810.*

To the plea of the stat. lim. plaintiff replied a promise by the defendants within three years: and at Spring Term, 1825, the cause came on for trial before BADGER, Judge, when the jury returned a special verdict as follows: they

* *Be it enacted*, &c., that all suits on sheriff's, Superior Court clerks', and clerks of the Court of Pleas and Quarter Sessions' bonds, if the right of action has already accrued, shall be commenced and prosecuted within three years after the passage of this act, and not afterwards. And all such suits, in case the right of action shall accrue hereafter, shall be commenced and prosecuted within six years after the said right of action shall have accrued, and not afterwards, saving nevertheless the rights of infants, femmes covert, and persons non compos mentis, so that they sue within three years after their disabilities are removed.

“find the writing obligatory declared on to be the act and deed of the defendants (naming them), that the condition of the said obligation has not been performed, but broken in this, that *Slade Pearce*, in said obligation named, returned to the Court of Pleas and Quarter Sessions of Beaufort county a certain *feri facias*, at the instance of *Thomas Ellison*, against *Henry Adams*, at March Term, 1809, of said Court, “satisfied,” and did not then, nor hath (45) at any time since, paid the monies into Court, or to any person authorized to receive the same. They farther find that no demand was made against *Slade Pearce* in his life time, but that since his death and within a year before the commencement of this suit, a demand was made against the administrator of said *Pearce*; that *Frederick Grist* (who was one of the sureties to the bond) “died in 1811; that no demand was made upon any of the other parties to the bond, or their representatives, before the commencement of this action, except on *Walter Hanrahan*; that a demand was made on him, within a year before the commencement of this suit, and the said *Walter* promised to pay the same.”

On these facts the Court held, that the plaintiff should take nothing by his writ, and that the defendants go thereof without day. Whereupon the plaintiff appealed.

Hogg, for defendants.—The pleadings admit that the action was barred by force of the statute, and the question is, whether upon the replication and the proof under the issue, the action was revived by the promise of *Hanrahan*. The operative words in the act of 21 Jac. 1 ch. 16, and of our own act of limitations of 1715, and in that of 1810, are the same, to wit, that the suits shall be brought within — years “after the passage of the act, and not afterwards.” In the construction of these acts the lapse of years has been held a final bar to the suits herein mentioned, except in the action of assumpsit. It is sufficient for the defendants to rely on the words of the statute, which are express, that the suit shall be brought within three years after the passage of the act, and not afterwards. It remains for the plaintiff to show how his replication can avail him. He may if he knows of any precedent, produce it. The replication is a complete departure, the suit is on the *bond*, and

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the replication is founded on a promise in *pais*: even in the action of assumpsit, there is no such replication. If a demand be due on assumpsit to a testator, and be (46) barred by the statute, and a subsequent promise be made to his executor, he must declare on the subsequent promise; for if he declare on the first promise, and *reply* the second promise, it will be a departure. (*Williams' Saunders* 63 *q. note* 6.) The evidence to evade the force of the statute is assumpsit, is offered on the general issue, and several reasons have been offered to excuse the departure from the words of the enactment.

First, it has been said that the issue being joined on the promise within three years, that the affirmative of the issue is maintained by proof of the acknowledgment, which is by legal inference a promise, and it is alleged that the antecedent debt is merely a consideration to support the subsequent promise. But the plea of *actio non accrevit* is a good plea in all cases in assumpsit, and is the most proper one where the promise (as on a promissory note) is to pay a certain time after date, and the early mode of pleading the statute of 21 *James* 1, *ch.* 16, was to set it out at length.

Secondly, it has been alleged that the statute proceeds on the presumption that the debt has been paid and that the proof has been lost, and that the acknowledgment removes the presumption. This is not the only evil that the statute was meant to remedy or prevent; but the policy of the statute is to provide against all the mischiefs likely to arise from litigation of stale demands, one of the greatest of which did not concern the difficulty of proof after lapse of time as to the payment or discharge; but as to what was the agreement *itself*, which was afterwards remedied in part by the statute of frauds and perjuries, requiring certain contracts to be in writing. There are other evils which must be obvious, and therefore unnecessary to be mentioned. But whatever may have been the reasons, the enactment was general, "*that the suit should be brought within the time, and not after*:" and Courts of Law, in expounding the statute, had no right to depart from (47) the *express words* in pursuit of the supposed policy of the legislature. The best reason as well as the most probable, is, that the Courts, ²moved by the seeming

hardship of barring a debt where there had been an acknowledgment, swerved from the literal construction of the statute, and that the error has become settled on authority, and therefore has been reluctantly acquiesced in. (See same note in *Saunders*.) But this effect of a subsequent acknowledgment has been conferred to the action of *assumpsit*, and the reasons apply exclusively to that form of action. It would be absurd to suppose an acknowledgment could have any effect upon an action in tort, barred by the statute, upon an action for assault and battery, or for neglect of duty in a public officer; seeing that neither of these actions arise upon *compact*; but the first on the positive, natural and legal rights of the plaintiff, and the other on his relative rights by law established. But the statute of 1810 has not only the words which, when applied to torts in the act of 1715, are held to create a final and irreversible bar to an action by reason of such tort; but the *policy* of the statute was to secure the sheriff from suits against him on stale demands, and chiefly to protect his sureties from any suit not brought within *three* years after the passage of the act, where the action had then accrued, or within four years after cause of action as to suits subsequent to the statute. If the sureties had stipulated in the bond that they were not to be liable for any breach, unless suit should be brought within the times prescribed by the statute, the conclusion would be compulsory that they would not be liable on any suit not brought within the stipulated time. The legislature confessedly have power to say within what time suit shall be brought. It is very certain, independent of technical reason which is itself unanswerable, that the liability on the bond being once extinct, can never be revived against the sureties by a parol promise. For the action of *assumpsit* would not

lie for the real plaintiffs against the sureties on their (48) *express* promise, after three years, to pay the plaintiff's demand; because the sureties derive *no advantage* from him, and he *sustains no loss* by their promise. The sheriff who had received the real plaintiff's money, would be answerable for the money of the plaintiffs in an action of *assumpsit*; and upon authority, a subsequent promise to pay would be sufficient, if made within three years before suit. It may be as well to mention, that if

the breach were for a tort (as for a refusal to serve process) that it would be absurd to suppose that any promise could give or revive a right of action on the bond for a tort. And the statute applies to all suits, and for all breaches.

In Massachusetts they have a statute limiting actions against executors to four years after qualification; and upon this statute a subsequent promise of the executor has been held unavailing, because the act was made for the benefit of heirs and legatees and distributees, and not for his personal convenience *merely*: so in the principal case, the sureties are mainly the objects of favour with the legislature. *Brown et al. v. Anderson.* (13 Mass. 201.) *Davis v. Shed.* (15 Mass. 6.) *Ex parte Allen.* (15 Mass. 58.) *Thompson v. Brown et al.* (16 Mass. 172.)

TAYLOR, Chief Justice.—Whatever effect the promise to pay the money might have, in rendering *Hanrahan* individually liable (which is not the question now), it is evident that it cannot charge him in a joint action with the other sureties, when the suit is on the bond. It has been held, that in an assumpsit against several persons, the acknowledgment of one will take the case out of the statute as to all; and even in assumpsit against one, upon a joint and several promissory note, the acknowledgment of another drawer, not sued, will take the case out of the statute as to him who is sued. (2 *Douglas* 652.) But the reasons of those cases do not apply to an action of debt on a bond,

in which the declaration charges that the defendants (49) became liable by their certain writing obligatory, and a replication to a plea of the statute of limitations, that within three years they made a promise in manner and form *as the plaintiff had complained against them*, will be a departure from the declaration and in conflict with it. In these cases, too, the defendants held themselves out to the world as partners in that transaction, and, as such, the promise of one became obligatory on all. I think the bar of the statute could not be removed even by the promise of all, when they are sued on the bond, although if a presumption of payment from length of time had been relied upon, such promise would be proper and strong evidence to repel it. But where a positive bar by

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statute is relied upon, a new promise cannot revive the remedy *on the bond*. For these reasons I am of opinion that the judgment should be affirmed.

The rest of the Court being of the same opinion,

Judgment affirmed.

Approved. *Wagstaff v. Smith*, 39 N. C., 1; *Thompson v. Gilreath*, 48 N. C., 493; *Hewlett v. Schenck*, 82 N. C., 234.

PRIDE, executor of Jones, v. PULLIAM.

From Wake.

A testator by will directed his slaves to be liberated whenever the laws of the state would tolerate it, and that until that time, the slaves should be divided among his wife and children according to the statutes of distribution: eight years after the probate of the will, and after the slaves had been delivered over to the wife and children in a course of distribution, the executor filed a petition to emancipate one of the slaves, and set forth meritorious services. *Held*, that as the testator had not given it in trust to the executor to see to the emancipation of the slaves at any indefinite period of time, and as they had been delivered over to the wife and children by the executor, the trust ceased in the executor, and he had no authority under the will to file the petition; and the facts all appearing on the face of the petition, it was dismissed.

At February Term, 1815, of Wake County Court, the last will and testament of *Nathaniel Jones* was admitted to probate, and *Edward Pride*, who was named therein as executor, qualified as such.

The will contained these words, viz:

First, my will is, that all my negroes, male and female, who has arrived to the age of twenty-four years, and their increase as fast as they shall arrive to the said age of twenty-four years, be emancipated or liberated, whenever the law or laws of said state will admit, or tolerate it.

And I do most solemnly enjoin it as an injunction on my executors hereinafter named, and all my representatives, not to sell, give, swap, or convey any of the negroes or their increase, in or out of the said state, as I may die seised or possessed of; and farther my will is, that until the said state shall pass a law or laws, for tolerating emancipation or liberation, that all my negroes that I may die seised or possessed of, may be divided among my wife and children, agreeably to the laws for the distribution of intestate's estates, and notice being had to what has already been given to my children, of which I have kept a just account, for which see a small memorandum book.

The conclusion of the paper was as follows, viz :

I suppose it will be asked my reasons for emancipating my negro slaves when the laws of the state will admit or tolerate it ; which reasons are, as follows, to wit :

Reason the first. Agreeably to the rights of man, every human being, be his or her colour what it may, is entitled to freedom, when he, she or they arrive to mature years.

Reason the second. My conscience, the great criterion, condemns me for keeping them in slavery.

Reason the third. The golden rule directs us to do unto every human creature as we would wish to be done unto ; and sure I am, that there is not one of us would agree to be kept in slavery during a long life.

Reason the fourth and last. I wish to die with a clear conscience, that I may not be ashamed to appear before my master in a future world. These are the reasons for emancipating my slaves ; and I wish every human creature seriously to deliberate on my reasons. And so farewell to this terrestrial world.

By a petition to the Superior Court of Wake, filed January 11th, 1823, the executor, setting forth therein the will, stated, that among the slaves of the testator at the time he died, was a black man named Allen, now of the age of twenty-eight years, whose conduct from his childhood had always been sober, honest, industrious and exem-

(51) plary, in every respect as a faithful and trusty slave, and that his services had been meritorious and useful, and that accordingly he stood high in the favor and confidence of his late master; that by the intermarriage of the defendant with *Amelia*, one of the coheirs and legatees of the testator, the defendant became possessed of the said slave Allen, and detained him in slavery, claiming to be his owner and master; and that the defendant had sold or was about to sell said Allen to a dealer in slaves.

That the petitioner was ready to furnish satisfactory evidence of the good moral character and meritorious services of Allen; and that Allen was prepared to give such security as is required in cases of emancipation by our law ; and the executor, therefore, prayed of the Court, that Allen might be emancipated and set free from bondage, pursuant to the will of his late master.

On hearing the petition, his honor Judge DONNELL was of opinion, that a license could not be granted to emancipate upon the facts disclosed by the petition itself, and therefore ordered it to be dismissed; whereupon the petitioner appealed.

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Seawell, against the petition. — This is a petition on the part of *Pride*, as executor of *Nathaniel Jones*, to liberate a certain slave who belonged to the testator. The will is proven in 1815, February Term of Wake County Court, at which time the executor qualifies. These facts appear in the case: in 1823, January the 11th, it appears that the executor files his petition, after a lapse of eight years. The law respecting executors and administrators requires them after two years to deliver over the estate. The executor in his petition states, that this slave is claimed by *Pulliam* “in virtue of his intermarriage with *Amelia*, one of the co-heirs and legatees of said testator.” The will is set out at length in the petition; by which it appears that *until* (52) *the state shall* pass a law or laws tolerating emancipation, the slaves are to be divided amongst wife and children agreeably to the laws of distribution. And it appears also from the record, that *Pulliam* has been summoned to answer the petition. What is the legal inference from all the facts? The law in the first place presumes that the executor did his duty, because he takes an oath; if it does so, then it is to be understood *prima facie* that at the expiration of two years the executor delivered over the slaves to the legatees; but if the law will not do it in two years, will it not in eight? or if the law unaided by circumstances will not in eight, are there not such circumstances here as put it out of dispute? The petition itself charges as a *gravamen*, though it may rely upon the will, and the peculiar merit of the slave as the *gist* that the slave is claimed by *Pulliam* in virtue of his intermarriage, and charges that he is about to sell him to a southern speculator. If the slave had never been delivered over, the legatee could not sell. And a citation is issued at the instance of the executor against *Pulliam* to answer the petition. The bequest of the slaves is general to the wife and children, to be divided amongst them. *Pulliam*, therefore, in virtue of his intermarriage, could not acquire title to Allen without a division. It therefore does seem to me, that this Court is obliged to perceive from the petitioner’s own case, that he has no interest or title in the slave. With regard to the devise to be liberated, I will barely mention *Haywood and Craven’s* executors, and several other cases in this Court. *Callier Hill’s* executors is

one of them, where the authority of the former case has been established. No ground, therefore, can be formed from or upon the *will*. The will, indeed, does not contemplate anything done under the existing laws, but only when *laws shall be* passed, and provides for the interim. The ground, then, must be formed upon the act of 1777. That act contemplates the *owner* liberating his own slaves, when the liberator is to bear the loss; the office of the Court is not to *liberate*, but only to allow or grant (53) *license* to the owner. The Court is interposed to prevent liberation, except in cases of meretricious service. These services the Court is to judge of; but the *emancipation* is the act of the owner. Can it be supposed that it ever was contemplated to vest a naked trustee, an executor who gives no security, with power to liberate the whole estate of his testator, though he might admit merit in Court, or prove it to the satisfaction of the justices or judges? No; there is wanting one ingredient, in the estimation of the legislature, that the humane and benevolent man should exercise these kind feelings at his own expense; that he should be the loser; and then there would be little danger of any mischief from emancipation. Let me suppose a case, for the purpose of proving how, under such a construction, the basest purposes could be effected. Suppose the testator in this instance had been entirely free from debt, and had on hand a large capital in money and bonds; that the executor never interfered with the slaves, but had them divided immediately; that after two years expired, the legatees pressed him to account with and pay over to them the monies he had been using to his own purpose ever since his qualification; that he put them off with promises and partial payments for seven years; when being about to remove himself to a distant country, without acquitting himself of his solemn undertaking, they are compelled, in justice to their own rights, to commence an action, and then the executor, urged by the appeals of humanity in the testator's will, and his own sympathies for the sufferings of his fellow man, though he had turned a deaf ear to them, or had not been conscious of their force, for eight years, should under that pretence come forward and liberate the whole estate? Such a case would certainly be considered outrageous in the extreme, and yet, admit

the fact of the suit by the legatees, and of the removal of the executor, and the fair inferences of this case, as appears by the record, will warrant us in pronouncing it such a one.

Badger, contra. — The prayer of the petition is op-
(54) posed here, and it was denied in the Court below, upon the ground that, though the slave *had performed the meritorious services* contemplated by the act of 1777, *ch. 6*, the law forbade the emancipation prayed for.

Suppose the application to have been made by the testator in his life, is there any doubt that the emancipation ought to have been allowed? If so, why cannot that emancipation be obtained by the executor? If the purpose be unlawful, the testator is as much restrained as the executor; if lawful, it requires some reasoning and authority to show that the same thing cannot be done by the executor upon the express direction of the testator. As a general proposition, "*ejus est dare ejus est disponere*" is certainly true; and what a man may lawfully do himself with his own, he may lawfully direct his executor to do. If there be any exception to this rule, which embraces the emancipation of a slave directed to be obtained by an executor in a case where confessedly the same thing might lawfully have been done by the testator, it is at least incumbent on the other side to show it. It has not been shown. I infer, then, that if the will had directed that this particular slave should be liberated, or that so many as had performed meritorious services should be emancipated, no legal objection could be raised.

But the direction of the will is general, that all his slaves be emancipated when a law shall allow it. Let us see, then, if the case is varied by the use of this phraseology. The emancipation of slaves is forbidden by the policy of the law, if it be morally wrong or expressly forbidden by statute. That it is not *malum in se*; that it would be, if not laudable, at least allowable in itself, is too clear to admit of doubt. The preamble of the act of 1777 shows this to have been the understanding of the legislature, and that previous to that law emancipation might be made by the owner. It is an act not to *confer* a privilege, but to *restrict* one already passed. How, then, is it re-
(55) stricted? for only so far as it is restricted is it un-

lawful. The provision is, that no slave shall be emancipated *but for meritorious services*; undeniably, then, for meritorious services he may be emancipated. If before the act the power of emancipation had not existed at all, this expression *but for services* would have amounted, upon every principle of construction, to a legislative grant of the power to emancipate in the case referred to by that expression; *a fortiori*, in a *restraining* law, the power remains in a case excepted out of the restraining provisions of that law.

But it is said he directs *all* to be emancipated, and as *all* cannot be, therefore none shall. That this conclusion is not warranted by any principle of reasoning, is evident. That, as *all* cannot, *none* shall, is an argument almost as absurd as if the proposition were inverted, as *none* can, therefore *all* shall. Suppose by law all slaves over twenty-one years could be emancipated, and those under could not; suppose a will emancipates all; surely it could not be successfully contended that as the will could operate nothing in favor of those under the age of twenty-one, therefore it should fail as to those over that age.

But it is said, farther, that the emancipation is directed to be made when a law shall be passed to allow it, and therefore it cannot operate though a law already in existence does allow it. And why not? The testator desired the emancipation of his slaves, of all and each of them; he supposed it could not be done by the laws in force, but as to one of the slaves it seems it can now be done; surely it is a strange construction to say that it shall not be done as to that one under the existing law, because the testator refers to a law to be passed for that purpose. The intent is clear; the law allows the intent to be executed in part, and why shall it not be executed? The testator wills it; the law allow it, but the defendant is unwilling, and therefore it cannot be done.

Suppose (as I have already done) that by law (56) slaves under twenty-one could not be emancipated; those above that age might; then a will is made directing all slaves to be emancipated when a law should pass authorizing it; would it not shock common sense to contend that the slaves over twenty-one could not be emancipated under the *existing* law? For suppose a new

law passed re-enacting the old in *hæc verba*, the new law would operate nothing. A statute declaring what the old law is, introduces no new law; and a statute re-enacting a subsisting statute cannot be said to have any operation. It is the old law which continues in both instances after as well as before.

Suppose in England a will directs trustees to convey all the testator's estate, *real and personal*, to A in *tail male*, with "remainder in tail to B, remainder to the right heirs of the testator *whenever a law should be passed authorizing such a limitation.*" By the existing law the limitation is lawful as to the real estate, shall not the trustee convey the real estate accordingly? or shall it be said the testator did not wish this limitation under an old law, but would have it under a new one alone; and consequently the direction shall fail altogether, and the heir at law shall take.

But what, in such case, would be said of the personal estate? The law does not authorize such limitation. Nothing can be limited upon an event so uncertain as the enactment of a law hereafter, which may never pass or may not in centuries; and the whole shall vest in A, because by law the limitation to A, in tail of personality, gives him the whole.

And this I take to be the amount of the adjudged cases of *Craven's executors* and of *Hill's executors*, and the other cases decided in this state.

The Courts have held that where the next of kin claims the slaves from the executor, he cannot resist that claim by showing a direction to emancipate, which by law can not *now* be carried into effect. And that as the executor takes no beneficial interest, he shall not retain the property to his own use, but shall hold for the next of kin; and the contingency of a law being passed is too remote and indefinite. In all those cases it was not *pretended* even that such services had been performed as rendered the bequest lawful as to any one of the slaves; but it was conceded that the trust was *unlawful*, and could not be executed, and the Court was called upon in the case of *Craven's executors* to permit the property to remain in the possession of *naked* trustees, or to apply it to some *charitable* purpose; both which they refused. And in the

case of *Craven's* will *some* of the slaves had been emancipated for meritorious services, and it was not pretended that the proceeding was not valid. But the only question was, whether, as to those slaves whose emancipation was clearly prohibited, by law, the executors should retain the possession against the next of kin, where the *trust* for which they had the possession could not be carried into execution, because forbidden by the subsisting law of the land.

How this case can have any relation to the one before the Court, I profess myself unable to perceive. For if the emancipation of a slave for meritorious services be forbidden by *the policy* of the law, it involves this absurdity, that a thing is contrary to the policy of the law which is allowed by the express provisions of the same law. It may be the opinion of a Judge, as an individual, that the emancipation of a slave even for *meritorious services* is bad policy; but *judicially* his opinion must be, that what is expressly allowed by a statute cannot be against the *policy* of the law.

But it is farther objected, that the law authorizes emancipation for services by the *owner* only, and the executor is not the *owner*. The act of 1777 does not mention owner as to emancipation, but suppose it did, and it is strictly to be confined to owner, and executor is not (58) owner within the statute. The provision is *prohibitory*. It does not grant, it restrains. And upon the construction contended for it restrains the *owner* only, and not the executor; which leads to a conclusion directly opposite to that drawn from it by the counsel on the other side; a conclusion absurd, I admit, but irresistible if the reasoning on the other side be allowed. But the act is silent as to the *persons* who are forbidden or allowed to emancipate. And, therefore, if the testator may himself do it, he may authorize his executor; and if the testator cannot himself, neither can his executor by his direction. The executor has the *legal* estate, and if the trust be not unlawful he is owner to execute that trust.

But it is said the act of assembly authorizes the County Court to grant *a license* only, and the emancipation must be the act of the petitioner, and so an executor may obtain a license, and then retain the slave to his own use. If it

were so, the consequence would not follow; for if the executor, after getting license, do not emancipate, the Court will compel him to surrender the slave to the next of kin, and will never allow him to retain *beneficially* himself. But in this case, if the negro (as is said) be in possession of the defendant, he can never be divested of that possession but by a complete emancipation.

But the counsel on the other side has mistaken the state of the law. The act of 1796 (*ch.* 453), to amend the act of 1777, authorizes the Court to complete the emancipation. And such has been the constant practice since. The Court determines on the services, and when they are allowed, the petitioner's prayer is granted, and upon his wish to liberate, a judgment is entered declaring the slave liberated and entitled to all the privileges of a free born negro. And an examination of the act will show that its object was two-fold. 1st, to declare, in positive terms, that no *pretence* should avail for emancipation, nothing but meritorious services; and 2d, to extend the power of the Court to enable them to complete the act of liberation, and leave nothing in the after discretion of the owner.

The supposition of the defendant's counsel, that the (59) petitioner may be influenced by bad motives, is certainly entitled to no weight if true, and is only now noticed from respect for the supposer, and not any respect for the supposition. If the testator wished the emancipation, the law allows it; the executor applies for it; if his motive be ill, let him be reprobated; but surely we are not to frustrate the declared and lawful wish of the testator in order to punish the executor. It is well if ill motives sometimes stimulate bad men to the performance of a sacred duty, and it is one of the highest attributes of Deity to bring good out of evil. But if character and motive are worthy of attention, what shall be said of a man who, taking a large property as a mere god-send against the wishes of the owner declared in his will, shall be disposed to frustrate those wishes in one particular in which the law allows them to be gratified? who sacrifices to a mean avarice every consideration of humanity and mercy; who regards neither the welfare of the living, nor the declared intention of the dead; who holds the former in slavery without right, and robs the latter of property

which he did not intend he should enjoy; whose bosom is inaccessible to the emotions of kindness; who remembers without regard the dying wishes of him on the fruits of whose industry he fattens, and makes a base advantage to himself by trampling on what the barbarous and the refined, the ancients and the moderns, have united in esteeming sacred; whose callousness to moral considerations exceeds that of the robber on the highway, and can be likened only to that of him who robs a tenant of the grave.

But all this is beside the subject, and cannot have weight with the Court. It has been drawn from me by the attempt to exhibit the defendant as a meritorious and suffering man; himself all honor, his adversary all crime.

If the prohibition against emancipation be confined to the provisions of the statutes, the petitioner is certainly (60) (I think) entitled to the prayer he has made.

If we wander from those provisions, we have no guide or limit. The principles contended for on the other side would seem to make *freedom* in itself an evil, and slavery a bounty of heaven; and if followed out by action with the *enthusiasm* with which they are supported by argument, must lead us to undertake a crusade with the laudable purpose of extirpating liberty among mankind, and establishing the happiness of servitude and the calmness of despotism in its stead.

HALL, Judge.—The testator, in the first clause of the will, directs his slaves to be liberated whenever the laws of the state will admit or tolerate it; he then enjoins it upon his executors, and all his representatives, not to sell, give, swap or convey any of the negroes or their increase in or out of the state; that until the state shall pass a law for tolerating emancipation, his negroes shall be divided amongst his wife and children, agreeably to the laws for the distribution of intestate's estates. The will was proved at February Term, 1815. This petition was filed at May Term, 1823, eight years afterwards, and after the slave for whose benefit it professes to be filed has been delivered over to the defendant in a course of distribution, as the testator in his will has directed.

The testator has not continued the trust in his executors to see the liberation of his slaves, at any indefinite period

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of time; when they were delivered over to his representatives by the assent of his executors, the trust would seem to cease in the latter, and attach to the former. If that is the case, the executors filed this petition without any authority from the will. For this reason I can see no objection to the decree of the Court below when they dismissed it, and I think that decree should be affirmed.

The rest of the Court concurred.

Judgment affirmed.

(61)

FINCH'S EXECUTORS v. ELLIOT.

From Rutherford.

Where, upon a record and statement of the case sent to this Court, it appears that the charge of the Court was not applicable to the facts stated, a new trial must be granted; for if there was no other evidence but that stated, the charge was irrelevant; and if there was other evidence, it should form part of the case; and in either event a new trial will be granted.

This was an action on the *case*, brought to recover the amount of two orders drawn by one *Nelson*, in favor of the plaintiff's testator, on the defendant, and which had been accepted by the defendant in 1812. Defendant pleaded, among other things, the statute of limitations; and on the trial it was proved by a *Mr. Hord* on behalf of plaintiff that in the year 1817 the orders were sent to him by plaintiff, who lived in Virginia, for collection; that he called on the defendant, and in a conversation with him he produced a number of papers, from which the witness became satisfied that nothing was due to the plaintiff, and he returned the orders; in the year 1819 one *James Finch* came to the State as agent for the plaintiff, and *Hord* went with him to see the defendant; in the conversation which took place, defendant again produced certain papers, from which *Hord* was satisfied, and he thought that the agent was also, that nothing was due. The writ issued April 15th, 1821, and on one of the orders a payment was endorsed, bearing date May 1st, 1814.

The Court, on this evidence, instructed the jury that nothing short of an express acknowledgment of a subsisting debt, at the time of making the acknowledgment, could

take a case out of the statute; that an agreement to settle would have that effect, and it was for them to say whether any such agreement was made by the defendant at (62) the times spoken of by *Hord*; if there was, they were instructed to find for the plaintiff, and if not, for the defendant.

The jury found for the plaintiff, and the case stood on a rule to show cause why there should not be a new trial.

Wilson, for defendant, contended that there was no evidence either of an acknowledgment or promise; and, consequently, the charge of the Judge, however correct as to the law, had no application to the case as proved. He should have explained the law arising on the facts of *this* case, by informing the jury that if the evidence was all true, yet the law would not, under the circumstances, infer a promise or acknowledgment.

HALL Judge.—When the Court charged the jury that there must be a subsisting debt, at the time of the acknowledgment, or that a proposition to settle accounts would take the case out of the statute of limitations, it would appear that there must have been more evidence before the jury than appears upon the record sent here. It does not appear from the evidence exhibited here that there was an acknowledgment of a subsisting debt, or an agreement to come to a settlement; and if there was no other evidence before the jury I think the charge was not relevant, although there can be no doubt but it is warranted by law. If there was no other evidence before the jury I think there should be a new trial; if there was, it should form part of the case, and for that purpose a new trial should be granted. I think the evidence offered by the plaintiff establishes nothing from which a new promise or an acknowledgment can be collected.

HENDERSON, Judge.—I am almost afraid to touch this subject, for the decisions are so much at variance and (63) so numerous, that it is almost impossible to say anything on the subject without being in opposition to some of them.

I still retain the opinion that an acknowledgment of an unsatisfied consideration, when accompanied with an express refusal to pay, will take a case out of the statute; but in such a case the unsatisfied consideration should very

clearly appear from the acknowledgment, taken altogether and in connection with the things referred to in it, as if at the time of refusal there was an explicit acknowledgment that the debt had never been paid: or where it clearly appears from the reference there made, as if a defendant were to say that he would not pay the debt, for that he was discharged from its payment by his certificate of bankruptcy, and it should appear that the debt neither was nor could be proved under the commission; it is not sufficient that it is shown by argument and conjecture that it is quite probable that it has not been paid. The whole transaction taken together, where there is an express refusal to pay, or a reliance on the statute of limitations as a protection, which I think is the same thing, amounts to an acknowledgment of an unsatisfied consideration, it is not sufficient that the jury believe from other sources that the debt is unsatisfied, they must found that belief upon the acknowledgment and its references, otherwise it would amount almost to a repeal of the statute, in such cases, *i. e.*, where there is an express refusal to pay. It is not sufficient that the thing referred to or relied on to show the discharge, does not show it; it should show the *reverse*.

In the present case I cannot see that there was any evidence which the Court should have left to the jury; for allowing it to be true, it did not prove the point in issue upon the statute, nor could the jury infer it. The witness stated that the defendant, upon being applied to by him as the plaintiff's agent, said that he had paid the debt, and produced papers which satisfied him that it was paid; that

(64) the plaintiff afterwards applied in the witness' presence, who made the same reply as before, and again produced papers, which the witness thought satisfied the plaintiff. Here was no evidence, either direct or indirect, from which the jury were at liberty to say that the defendant agreed to settle with the plaintiff, and the Judge should have so instructed the jury. The rule for a new trial must be made absolute.

The CHIEF JUSTICE assented.

Judgment reversed.

DOE v. PAINE AND SAWYER.

DOE on dem. of Tatem and Baxter v. PAINE AND SAWYER.

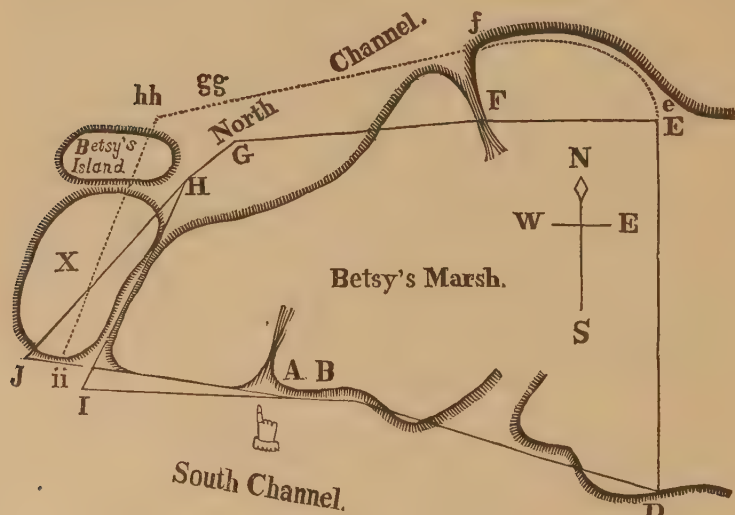
From Pasquotank.

What are the termini or boundary of grant or deed, is matter of law ; where these termini are, is matter of fact. The Court must determine the first, and to the jury it belongs to ascertain the second. Where there is a call for natural objects, and course and distance are also given, the former are the termini, and the latter merely pointers or guides to it ; and, therefore, where the natural object called for is unique, or has properties peculiar to itself, course and distance are disregarded ; but where there are several natural objects equally answering the description, course and distance may be examined to ascertain which is the true object ; for in such case they do not control a natural boundary, but only serve to explain a latent ambiguity.

Where a Judge below is correct in his statement of a rule of law, but makes a misapplication of it, and it is obvious, from the finding, that the jury were led into no mistake thereby ; *it seems* that a new trial will not be granted because of such misapplication.

If a release be offered in the course of a trial to render a witness competent, and is read without any objection made at the time as to the want of proof of its execution, by the subscribing witness, such objection shall not avail after verdict as a ground for a new trial.

Ejectment. The lessors of the plaintiff claimed under a grant from the state, dated 18th of March, 1823, to themselves, for the island marked X in the annexed diagram :



The defendants were in possession, and claimed the land under a patent granted to *Thomas Williams*, *Joseph Ferebee* and *John Williams*. dated 2d of December, 1807, described and bounded as follows: "A tract of land, &., known by the name of Betsy's Marsh or Island, beginning at Herring Gut (A), the beginning place of *John Humphries*' entry, running N. 79 E. 6 chains and 30 links, " &c., giving the courses, "inclosing an entry made by *John Humphries*, *Esq.*" These courses and distances are designated on the diagram by the letters A, B, C, D, E, F, G, H, I. From E the patent calls for a course "South 80 West, forty chains, *along the North Channel*;" the distance would terminate at f; the course and distance at F. If the course and distance are followed from f, the lines will run gg, hh, ii, and take nearly one-half of the island X, but the lines would be in the navigable waters of the North Channel.

The defendants offered to read a copy of *John Humphries*' entry to enable the jury to discover the proper boundaries of the patent; this was objected to, but the Court permitted it.

Defendants contended that the island X was, at (66) the date of *Humphries*' entry, and at the date of the patent to *John Williams* and others, called, known and esteemed a part of Betsy's Marsh or Island; and that the sluices had been enlarged by storms, and that there is not, nor never was, a channel between the island X and the main island; and to prove that fact, and also to show where the shoal at the head of the channels was situated, among other witnesses, they called *John* and *Thomas Williams*. It was objected that they had conveyed with warranty to *Sawyer*, one of the defendants, all their interest in the land, and the plaintiffs read a copy of the deed of bargain and sale to show it, which did contain a warranty to *Sawyer* for ten-twelfths of the land.

John and *Thomas Williams* then produced a release from *Sawyer*, which was read without any objection at the time to the reading of it, but an objection was taken that the release did not destroy the interest of the witnesses, as *Sawyer* had no right of action on the warranty before eviction. The Court held that the interest of the witnesses was removed by the release, and they were sworn. They deposed that they purchased *Humphries*' entry; that in

the year 1800 they had it surveyed by *Samuel Ferebee*, and that the land covered by plaintiff's patent was included in the survey; they run around all the islands (X being one) and cornered at the shoal extending from the point J, and so down to Herring Gut, the beginning. The North and South Channels separate one mile to the west of these islands, but the shoals of sand are covered by water down to the island. The witnesses *John* and *Thomas Williams* had been familiar with the place for forty years, and it was all called and known by the name of Betsy's Marsh; that the sluice between the island X and the main island, was so shallow that cattle, &c., crossed it with ease; that there never was any channel through it, though canoes could go through it; that there are two ship channels, one running on the north side of the island, the other on the (67) south, separating a mile above the island and uniting again at the inlet.

It was proven that the plat sent to the Secretary of State, on which the patent of *Williams* was obtained, was not made from actual survey, but that the county surveyor took it from the survey of other persons.

Plaintiff then called *Samuel Ferebee*; he could not say whether he included the small islands or not in the survey; he run the lines as he was directed by *Thomas* and *John Williams*; nor had he any recollection of having run by *Humphries'* entry, or any other entry or paper, or that the county surveyor made his plat from the survey of witnesses. He produced his field book of the survey, and they did not correspond with the calls of the patent.

The Court informed the jury that the principal question for them was, whether the land covered by the grant of plaintiff's lessor was included within the bounds of the patent, under which defendants claimed. If it was, then they should find for defendants, as theirs was the oldest grant. To ascertain the true boundary they would be guided by those calls in the patent which appeared to them most certainly to make out the intention of the parties; that there was no dispute until they came to the letter E in the plat; the call thence was, "North 80 West, 40 chains, *along the North Channel*;" it was not disputed that the course was variant from the North Channel; the course, therefore, must be disregarded, and the natural

boundary followed, which, it was admitted, would be extended to f. From that point, if there was no other calls in the patent, course and distance would be their guide, although the lines might run over land not liable to be entered, as land covered by navigable water; for no objection could arise in running an ideal line across navigable waters to ascertain the true boundaries of land on the banks of such navigable waters. The course and distance followed from the point f would carry them through the island X and terminate at ii, then the plaintiff's (68) would be entitled to recover that portion of the land west of the line. But there were other calls in the grant which the jury might look to, and be governed by, if these calls gave them greater certainty as to the true boundary. The patent, after calling for course and distance, has these words, "inclosing an entry made by *John Humphries, Esq.*" They were at liberty to look at the courses of that entry, and be governed by its boundaries in the same manner as they would by a known line of a neighboring deed, which was called for when the course and distance would not go to such known line.

The counsel of the plaintiff then requested the Court to charge the jury as to the effect of *Samuel Ferebee's* field notes of the survey. The Court said that the field book of *Ferebee* was not evidence, unless the parties consented that it should be so deemed; it might be used to refresh the memory of the witness, but for nothing else; and the jury was directed to pay no attention to it. There was a verdict for the defendants, and the lessors of the plaintiff moved for a new trial.

1. Because the release from *Sawyer* to *John* and *Thomas Williams* was read without having been duly proved by the subscribing witness thereto.

2. The release, if properly proved, would not render *J. and T. Williams* competent.

3. The entry of *Humphries* should not have been received in evidence, nor *Ferebee's* survey.

4. The Court misdirected the jury as to the law.

These reasons were overruled by the Court, and judgment was rendered, whereupon the lessors of the plaintiff appealed.

DOE v. PAINE AND SAWYER.

L. Martin, for defendants.—One objection taken by the plaintiff's counsel is that the Judge permitted a copy of *Humphries'* entry to be read in evidence to the jury. It is a sufficient answer to this objection to say that this entry is referred to in the description of the land contained in the grant under which the defendants claim; and, therefore, it would have been an error in the Judge to forbid its being read to the jury.

The next objection in the course of the trial was that the paper writing signed and sealed by *M. E. Sawyer* to *John* and *Thomas Williams*, was not such a release as entitled the defendants to examine these witnesses. This objection is well answered by referring to the copy of the release, which appears to be as full and absolute as possible.

The counsel for the plaintiff, after the jury returned their verdict for the defendants, then moved for a rule to show cause why a new trial should not be granted, and assign several reasons.

First, because the release from *Sawyer* to the *Williams'* was read without having been duly proven by the subscribing witness to said release.

It is a sufficient answer to this to say that the counsel make this objection too late. As the objection was not made at the time the release was offered, nor till after verdict, it must be considered as waived by them at the time they should have taken the exception, and the verdict cures the defect, if any it was. It is not pretended that any fraud was practiced in the introduction of this paper by the defendants or their counsel, nor that the paper was not examined by the defendant's counsel; but the case shows that they paid strict attention to this paper at the time it was offered, for they take exceptions to the legal effect of the paper, and insist that it is not such a release as entitles the defendants to examine the *Williams*. And, furthermore, this is no ground to call on the Judge for a new trial, as it is not his duty to examine every paper offered in evidence by the parties before it can be read, but his duty is to judge of the legal effect of the evidence after it is offered.

The second ground for a new trial is already answered.

The third reason is, "the entry of *Humphries* should

(70) not have been permitted to have been given in evidence, *nor Ferebee's survey.*"

The first branch of this objection has been sufficiently answered. As to "*Ferebee's survey*," I must remark that the matter in controversy was whether the island which was claimed by the plaintiffs and described in their grant, was contained in the grant under which the defendants claimed. If it was then, of course, the plaintiffs could not recover. In order to show that it was, I contend that the defendants had a right to show everything in their power, and if the evidence did not go completely to prove the fact, it would go for what it was worth only. It was a matter to be left to the jury. The evidence was not improper, and therefore not exceptionable.

The fourth and last reason is, "the Court misdirected the jury in the charge as to the law."

This reason is made so general that it cannot be specifically answered. I have looked over the charge of the Court with attention, and am unable to see on what part of the charge this reason rests. In the Court below, I believe the objection was confined to the part of the charge that follows: "If there were no other calls in the patent, course and distance would be their guide, *although the line might run over land not liable to be entered, or land covered by navigable waters; for no objection could arise in running an ideal line across navigable waters to ascertain the true boundaries of lands on the banks of such navigable waters.*"

I can see no objection to this part of the Judge's charge; and I feel confident, if a party shall not be allowed to pursue the actual line run because the North Channel has cut out part of Betsy's Marsh, that great injustice must be done to the party, for the statement shows sufficient evidence that on a place so exposed the wind is making alterations of boundary continually on the north side of the island.

HENDERSON, Judge, delivered the opinion of the
(71) Court as follows:

What are the *termini* or boundaries of a grant or deed, is matter of law; where those boundaries or *termini* are is a matter of fact. It is the province of the Court to declare the first, that of the jury to ascertain the

second. Where natural objects are called for as the *termini*, and course and distance and marked lines are also given, the natural objects are the *termini*, and the course and distance and marked lines can only be resorted to by the jury to ascertain the natural objects; they act as pointers or guides to the natural object. When the natural boundary is unique, or has properties peculiar to itself, these pointers or guides can have but little effect, in fact, I believe none. Where there is more than one natural object in the neighborhood answering the description, that is having common qualities, then those pointers or guides may be reverted to to ascertain where the object called for is, or which is the object designated. They do not then contradict or controvert natural boundary; they explain a latent ambiguity created by there being more than one object which answers the description. It is completely within *Lord Bacon's* illustration of the rule as to a latent ambiguity. The Judge was, therefore, right in his general observations, that natural boundaries must prevail over artificial. But this is rather a rule of law than of fact; it governs, properly speaking, him and not the jury. It was a misapplication of the rule to inform the jury that after arriving at the letter H, they were at liberty to pass through the island X on the way to the great shoal, including part thereof within the grant and excluding part. The rule must work both ways. If the grant includes the whole of Betsy's marsh or island, without regard to courses and distances, because called for by it, nothing but what is Betsy's marsh or island can be included in it by courses and distances. The island X was part of Betsy's marsh or island or it was not. If the first, the whole of it (72) was included in the grant; if it was not, none of it could be brought within it by artificial calls. But this error produced no effect; the jury included the whole of the island X. A new trial ought not to be granted, therefore, for this error. The survey of *Humphries'* entry, made by the *Messrs. Williams*, was admissible to show the extent of Betsy's marsh or island, for the entry and grant had the same calls. It was also proper to show that they, the *Messrs. Williams*, for they were witnesses on the trial, were uniform in their opinions on the subject, and I understand, from the Judge's charge taken together,

that it was introduced for the first purpose; for throughout the jury are told that natural boundaries will prevail over artificial; by which I understand the Judge to say that in law the grant includes the marsh or island. I am inclined to think that the difficulties in this case have arisen from not attending to the description in the grant, which is *marsh* or island. If the island X could not pass under description of island, an island being land separated by water from other lands, and there being a sluice between the island X and what is called the main island, at all times having water in it, although fordable by cattle and hogs; yet it might pass under the description of *marsh*, for a marsh may include many islands, particularly when separated only by narrow and shallow sluices, and in the neighborhood of and surrounded by broad and deep waters, where such small separations would scarcely attract attention.

It is not the duty, or perhaps right, of this Court to value the evidence; but I think it would not be improper, in this case, to say, that after arriving at the letter H, if the line passed through the sluice, that is along it, there was no possible inducement after getting through it to go to the great shoal at the head of the channel, a *terminus* called for in the grant; only land covered by navigable water, which would pass, was included thereby; they would obviously have proceeded immediately to the (73) Herring gut instead of the great shoal; whereas if they run around the island X, and included it within the description, they were carried to the great shoal, and it then formed a proper *terminus* for their departure from the Herring gut, the place of beginning.

As to the objections to the release, the first as to its not being proven, comes too late, it should have been taken on the trial; the other is entirely unfounded, for an obligation or contract of any kind can as well be released before breach as after; the only difference is, that it requires more comprehensive terms to embrace a case before there is a breach. The words of this release, a copy whereof is appended to the record, was sufficiently comprehensive to embrace a case before breach.

Let the rule for a new trial be discharged.

Judgment affirmed.

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Cited and approved. Marshall v. Fisher, 46 N. C., 111; *Spruill v. Davenport*, *Ib.*, 203; *Clarke v. Wagoner*, 70 N. C., 707; *Mizzel v. Simmons*, 79 N. C., 182; *Strickland v. Draughan*, 88 N. C., 315; *Redmond v. Stepp*, 100 N. C., 212.

 WILSON v. MYERS and others.

From Beaufort.

A petition was filed against several defendants, complaining of an injury done to lands by a mill pond; a trial was had and verdict taken for the petitioner, and judgment against all the defendants: one of the defendants was dead at the time of judgment, and a writ of error was brought for this error in fact. On the return of the writ, a motion was made below to amend by suggestion of the death *nunc pro tunc*, &c. The motion was allowed on payment of costs, and the writ of error dismissed. On appeal to this Court—*Held*, that the amendment had been properly allowed, for it would have been at the trial a matter of course.

The injury arising to adjacent lands, by the overflowing of the waters of a mill pond, is a tort; although the statute has given a new remedy for it, it has not altered its nature.

This was a petition filed in 1816, in Beaufort County Court, under the act of 1809, against several defendants, complaining that the mill dam of the defendants (74) caused the lands of the petitioner to be overflowed; and prayed a writ to the sheriff commanding him to summon a jury to meet on the premises, inquire what damages petitioner had sustained, and assess the amount to be paid annually by defendants to the petitioner. In 1820, at the spring term of Beaufort Superior Court, a trial was had at bar, when the jury assessed the damages of the petitioner to 15*l.* annually for five years, and it was entered upon the record, "let judgment be entered accordingly."

In July, 1820, *Myers*, one of the defendants, applied for a *supersedeas* of this judgment, and stated on oath, that before the verdict of the jury was rendered, and the judgment thereon pronounced, *Lucy Blount* and *Louisa Worthington* (wife of *Joseph W. Worthington*), who were two of the defendants to the petition, were dead; and that no suggestion of the death of either was to be found of record in the proceedings in the suit; and farther stated, that

notice had been given the petitioner of an intention to apply for a writ of error on said judgment. A supersedeas was granted, returnable to the spring term, 1821; at which term the petitioner appeared and filed an affidavit, setting forth that the judgment complained of was not rendered by the Court on motion of his counsel, nor entered by his counsel, but by the *clerk* as a matter of course, on the finding of the jury; that he did not wish to have a judgment against any defendant who had died pending the suit, but only against those who were living when the issue was tried; and prayed to be allowed to amend his judgment so as not to affect the representatives of those who died. The Court refused to permit the amendment, and allowed the writ of error. *Louisa Worthington* died in November, 1817, and *Lucy Blount* in February, 1818. At Fall Term, 1825, NORWOOD, Judge, presiding, an entry was made on the record in these words: At the present term, the motion made at spring term, 1821, to amend the original record, by suggesting the death of *Louisa* (75) *Worthington* and *Lucy Blount*, as if it had been done at spring term, 1818, was reviewed; and it was now ordered that the entry of record of spring term, 1821, be rescinded; and it was farther ordered, that the amendment be made as prayed for on payment of all the costs of the writ of error. The terms were accepted by the defendant in error, who paid the costs into the clerk's office, and the amendment was thereupon made, and on motion made after the amendment, the writ of error was dismissed; whereupon the defendant appealed.

Gaston, for the appellant.—The Court improperly allowed the amendment.

1. This amendment was not allowable, had this been an ordinary suit. The general principle is, that after judgment is given and enrolled, no amendment is permitted in any subsequent term. (3 Bl. Com., 407.) According to our established practice, when a judgment is not entered in form, that must be considered as entered which corresponds with the allegations and findings. The judgment here, then, was, that all the persons named as proprietors of this mill should pay 15*l.* for one year's damage before the filing of the petition, and the same sum annually for four years

thereafter. The amendment prayed, is by suggesting the deaths of two previously to verdict, to make the verdict or finding against the survivors only, and the judgment one against them only.

When the term is past and judgment recorded, Courts will amend no farther than is directed by the statutes of amendment. (1 *Tidd*, 658, 660; 2 *Ibid*, 862.)

With regard to statutable amendments, the rule is, that *misprisons of clerks and officers of the Court* are amendable in all cases; but mistakes and omissions of the party, his counsellors and attornies, are amendable accordingly as the statutes make them matter of form or substance, and this will appear through the whole thread of the proceedings. (*Gilbert C. B.*, 117, *new edition*.) And that (76) is of substance, without which the judgment hath not sufficient grounds to warrant it. (*Ibid*, 121.)

Even the omnipotent act (as it is termed) of 16 & 17 *Charles*, 2, excepts matters which are of the right of the matter of the suit, or whereby the issue or trial is altered. (*Bac. Ab.* "Amendment" *B.*) And wherever the issue is changed, no amendment is allowable. (2 *Wils.*, 147, 148.)

The omission here is that of the *party*; he did not even inform his attorney; it was no negligence of the clerk, or attorney, or Court, but his own inattention, and his affidavit *conceals* whether he knew the fact or not.

The amendment, too, is of *substance*; it is to change a judgment against seven, into one against five; to alter the issue or finding of the jury, what the proprietors, who had been all before named, should pay annually; and that, too, where it is doubtful whether those against whom it is rendered can call on the others for contribution; it is of a fact on which the new judgment is to stand.

But farther, it is also a rule that even when amendments are allowed for mistakes of clerks and other officers, there should be something *to amend by*. (1 *Tidd*, 661; 2 *Ibid* 822, 3; 1 *Sellon*, 401; 2 *Ibid*, 457; 1 *Term R.*, 782.)

Our statute of amendments introduces no new rule with respect to amendments after judgment. The first two clauses apply only to matter of form, and the third is evidently restricted to amendments in the progress of a cause. Upon this principle our Courts have uniformly acted. *Par-*

nell v. M' Crawley (3 N. C., 177); *Baker v. Moore* (4 N. C., 637).

But if this amendment might have been allowed in an ordinary suit; then,

2. It was not an admissible amendment in *such a suit as the present*. The practice of suggesting the death of one of several defendants arises under statute 8 & 9, *Will.* 3. This statute permits it, only where *the cause* of action as originally preferred survives against the rest. (2 (77) *Tidd*, 848, 9.) Here it has not so survived; for, by the petition, by the judgment, compensation is demanded, not for the *tort done* when the suit was brought, but for the annual damage for five years subsequent to the suit, and part subsequent even to judgment. Perhaps the plaintiff might, under the provisions of the last section of the act of 1809, have taken a judgment against the survivors for one year's damage prior to the suit; because as tort feorsors, each was liable for the wrong then done. The act, however, as it respects the annual compensation, clearly contemplated that it should be received of all the owners; there is no provision made in the case of the death of any of the parties; it is an anomalous proceeding, to be regulated by itself, and is not governed by the rules applicable to ordinary suits. (7 N. C., 254.) Either the action abates, because the entire cause does not survive, or the inquiry should be, what compensation that portion of the owners should pay against whom only the proceedings are carried on.

But, again: one of the defendants surviving, and against whom the amended judgment is to be enforced, is not a person against whom the cause survives at all. *Joseph Worthington* is a party defendant, and there is no suggestion made from which his liability can at all appear; he was the husband of *Louisa Worthington* when suit was brought; was he so a year before? After her death had he any interest in the lands? He is not liable for the tort previously to his marriage; nor can he be called on to make compensation for future injuries after her death. Nor can the judgment be vacated as to him, and sustained against the others; it is entire, and if wrong against him, must be revoked *in toto*. (12 *Johns. Rep.*, 434; 14 *Ibid.*, 417.)

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3. Amendments are never made, except to subserve the incontestible merits of the case. If here the action can be maintained against the survivors, it is unjust that they should be made *solely* responsible for the *whole* benefit (78) fit which they, *in common with others*, receive from plaintiff's property. Farther, it is unjust that *Wilson* should be responsible for the use which *others*, and not himself, have of plaintiff's property. By recalling the judgment, no injury is done to plaintiff, for the cause will only be placed in the state in which it was *up* to the error committed. (11 *Johns.*, 460; 14 *Ibid.*, 412.)

But if these views are erroneous, and it was right to permit the amendment, still it was wrong to dismiss the writ of error.

The Court should have permitted the amendments and ordered a new venire. When amendments are allowed on extraordinary occasions after judgment, it is always on condition that the opposite party should have a fair opportunity of being heard on the case, as he would have been before the issue found. (1 *H. Bl.*, 238.)

The defendants should have an opportunity of showing that some of them were not at all liable, and others not for the whole. They should have an opportunity of showing that *they* were not proprietors one year before the filing of the petition. They should have an opportunity of moving in arrest.

Hogg, for appellee.—The authorities relied on by the plaintiff from the books of practice, *Tidd*, *Sellon*, 3 *Blk. Com.* and *Gilberts Com. Plac.*, show only that misprisions of the clerks and officers of the Courts are not, by the British statutes of *amendment*, amenable, unless there be something to amend by. The error complained of in this suit, was not an omission of the clerk, but of the party: and is, therefore, not helped by the statutes of *amendment* technically so-called, but by those of *Jeofail*, and is within the terms of the 32 *Hen.*, 8, *ch.* 30, which directs the justices to proceed to judgment, any *mispleading*, &c., or *Jeofail*, or any *misjoining of the issue*, or any other default or negligence of any of the parties, &c., had to the contrary notwithstanding, and that the judgment shall stand, (79) and shall not be reversed by writ of error. Accord-

ingly, either in virtue of this act of parliament or by the common law, the very amendment moved for in this case has been allowed.

One of two plaintiffs died before interlocutory judgment; the other plaintiff proceeded to judgment without suggesting the death, and issued a *ca. sa.* on which the defendant was arrested; and on motion to discharge the body, the plaintiff moved to be allowed to amend by suggesting the death on the roll, and making the *ca. sa.* conformable thereto, and the amendment was allowed without costs. *Newnham v. Law* (5 Term, 577).

Suggestion of the death of one defendant allowed, after error brought to reverse judgment. *Hamilton v. Holcomb* (1 Johns. Cases, 29; *S. C. Coleman*, 61.) *S. P. Dumond v. Carpenter* (2 Johns., 184).

Suggestion of death allowed after notice of error, upon affidavit that the suggestion was ordered by the party's attorney, but neglected by the clerk. *Pannel v. M' Crawley et al* (3 N. C., 177).

It is objected to the case from 5 Term, 577, that it was upon an interlocutory judgment. The objection is a singular one. The uniform leaning of Courts of Law is, to sustain verdicts, and with good reason. The presumption is in their favor, because they have been obtained in open court upon a trial, where the adverse party, aided by counsel, was present to attend to his interest, and to see that the proceedings against him were regular and the proof sufficient. So thoroughly had this notion obtained, that all the statutes of *Jeofail* antecedent to 4 & 5 Ann, ch. 16, extend only to remedy defects in the proceedings in suits in which there has been a *verdict*; and the enactments usually begin with the words, "that if any verdict of twelve men shall be given," &c. The statute of 4 & 5 Ann is made for the express purpose of extending all the statutes of *Jeofail* to judgments upon *confession*, *nil dicit*, and *non sum informatus*. The case cited, therefore,

(80) is the stronger, that it is upon an interlocutory judgment. In *Newnham v. Law*, the proceedings were *ex parte*, and he who claimed advantage from them might, upon very rigorous practice, have been held to great exactness. But in the present case, the appellants, the defendants in the original suit, submitted the issue to a jury, and

took their chance of a favorable verdict; and when they are disappointed in the result, ask of the Court to *reverse* the judgment upon a defect in the record, which does not at all affect the justice of the judgment.

It is said; however, that if the amendment could be allowed in suits at common law, it ought not to be allowed in this proceeding under our act of 1809, *ch.* 773, *New Rev.* The proceeding under the act of 1809, is strictly in tort. The remedy at common law, for the tort complained of by the petition, was an action on the case, and survived against any of the trespassors. By the stat. of 8 & 9 *Will.*, *ch.* 11, and by the better opinion, by the common law, the death of one of the defendants pending the action on the case might have been suggested on the roll, and the plaintiff might have proceeded to judgment against the survivors. The evil under the common law was, not that one trespasser might be sued, or that the action would survive, but that the owner of a mill might be harrassed by frequent suits, whereby *small* damages might be recovered. The remedy by petition was interposed by the act of 1809, whereby it might be ascertained if the damage was less than 10*l.* per annum, when the petitioner was compelled to take his judgment for five years. If the annual damage exceeded 10*l.* he might elect to proceed at common law, and take a judgment for one year only, or he might take his judgment for five years. The parties remained as at common law, and the plaintiff might proceed against one or more trespassers. If he sued several and one die, he may suggest the death under 8 & 9 *Wm.*, 3, and proceed to judgment. But the objection that the action does not survive, will not avail here, for in a writ of *coram*

(81) *vobis*, the judgment cannot be impeached for error in law. The plaintiff in error can assign errors in *fact only*; because the judgment being of the same Court, is, by necessary intendment, good in law. It is not the inquiry whether the judgment be valid in itself, but whether the suggestion of the death of one defendant can be made after judgment, so as to render the proceedings before judgment regular.

Error *coram nobis* lies only for misprisions, and for error in fact, and for defects in the proceedings antecedent to the judgment. (*Bac. Ab.*, 1, 6.) The injury is,

whether the misprision of the clerk, or the defect in the proceedings be fatal, or whether it be immaterial or whether, if fatal, it be amendable; which are matters altogether independent of the question whether the judgment of the Court be valid in law, or erroneous; for judgment can be put in issue only by appeal, or writ of error from a Superior Court having jurisdiction by writ of error; and even in writs of error from a superior to an inferior Court, errors in law and in fact cannot be assigned together. (*Ibid*, letter K.)

The case of *Baker v. Moore*, cited from 4 N. C., 637, was on a motion to alter the verdict of a jury so as to increase the damages, of which there is no precedent.

There is another point for the defendant in error. The amendment is actually made in the original suit by the Court below, and the appeal is on the writ of error. There is now no error in the proceeding, and the Court cannot now disallow the amendment, having no jurisdiction to reverse the interlocutory order of the Superior Court giving the plaintiff the original suit by petition leave to amend; there being no appeal to this Court from the judgment in the suit by petition, but from the judgment in the writ of error only.

HENDERSON, Judge, delivered the opinion of the Court.

The statutes of amendments and of *Jeofails*, do (82) not affect this question; it depends on the principles of common law alone. As a general rule, it is unquestionably true, that no act of the Court, as contra distinguished from the act of its officers, or the parties, can be allowed or amended, but during the term at which it was done. During the term the record is said to be in the breast of the Judge; after it is over, it is upon the roll. But this rule applies to such amendments as call into action the judgment or discretion of the Court, and not to such as are a matter of course. In such cases the reasons of the rule no longer operate; for as much as the law confides in the integrity of the Court, it admits a possibility of its being corrupt, and therefore guards it from temptation.

The case in 5 *Term* is an authority for this amendment, and there could not be one more in point; and *Lord Kenyon*, in a few words, gives the reason. *It is a matter of*

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course; the motion, if made at the proper time, could not be refused by the Court. There can be no reason for not permitting it to be entered now for then, for it produces the same, and no other effect, than if it had been then entered. Upon its being entered, the error in fact assigned in this writ of error no longer exists. The judgment cannot, therefore, be reversed for error in fact. Whether there be error in law, cannot be inquired into by virtue of the present writ of error; but if it could, I think that there are none; for although the statute has given a new remedy for injuries arising from mill ponds, the injury is still the same in its nature; it is a tort, in which all or any one or more are liable for the whole injury. It therefore survives against the survivors. Nor is it any objection that some of those who did the injury were mere temporary owners, and that their interest may have since ceased. If their interest was limited, it should have been offered (if indeed it could have afforded any objection) when the five years' judgment was about to be entered up. If their interest were then uncertain, and have since determined by casualty, their remedy is by *audita querela*, or some (83) remedy in the nature thereof. If they are entitled to any relief, at any rate it will not justify the Court, upon a bare suggestion that such may be the case, to reverse the original judgment. The writ of error must be dismissed, and

Judgment affirmed.

Approved as to first point. *Gillet v. Jones*, 18 N. C., 340. *Approved* as to second point. *Butner v. Keelhu*, 51 N. C., 60.

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From Rutherford.

A discharge by a magistrate upon a warrant for a felony is *prima facie* evidence of the want of probable cause in an action brought by the defendant against the prosecutor for a malicious prosecution. In such action, the defendant may give in evidence in mitigation of damages, that *after* the prosecution instituted by him, the character of the plaintiff was bad, upon subjects unconnected with the felony for which he was prosecuted.

This was an action for a malicious prosecution. It appeared on the trial below, before NASH, Judge, that the defendant had taken out a state's warrant in 1821 against the plaintiff, charging him with stealing cattle; the examining magistrate dismissed the warrant and discharged the plaintiff. Up to the time of the charge made by defendant, which was first made in 1819, the general character of the plaintiff was proved to be good; and defendant then offered to prove that since the warrant had been sued out, plaintiff's general character, on other subjects not connected with this charge, was bad; the Court rejected the evidence, and instructed the jury, that it was necessary for the plaintiff to show, to their satisfaction, that the charge against him was malicious and preferred without any probable cause; that the dismissal of the warrant and the discharge of the plaintiff by the examining magistrates, were in law *prima facie* evidence of the want of probable cause; and when probable cause was wanting, the law in-

ferred malice. It was also proved on the trial, by (84) the magistrate who issued the warrant, that at the time of granting it, *Major R. Alexander*, who was administrator on the estate of the man whose cattle were alleged to have been stolen, advised the defendant not to take out the warrant, as he would have the costs to pay. The jury found for plaintiff, and defendant moved for and obtained a rule on the plaintiff to show cause why there should not be a new trial; first, for misdirection of the Court as to the law on probable cause; secondly, for the rejection of proper evidence as to plaintiff's character; and lastly, for surprise in the testimony of the magistrate who issued the warrant. To support this last ground, the affidavits of defendant and of *Major R. Alexander* were filed; the first of which stated, that *Alexander* was so much intoxicated when the trial took place, that he was unfit to be examined; and farther, that no such advice as was deposed to by the magistrate had been given by *Alexander*, but directly the reverse. *Alexander* swore that he did not recollect having ever advised defendant not to sue out the warrant; that he had no cause to do so, for he thought there were good grounds for a prosecution. The rule was discharged, and from the judgment rendered defendant appealed.

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The ground of surprise was afterwards abandoned here by *Mr. Wilson*.

Wilson, for the appellant.—In an action of slander, the plaintiff may give in evidence his rank and condition in life to aggravate the damages, and the defendant may to mitigate them. *Larned v. Buffington* (3 *Mass. Rep.*, 546).

As to the doctrine of probable cause: in a late case at *nisi pruis*, the plaintiff, to prove the charge malicious which had been made by the defendant before the magistrate, produced the defendant's information; *Mr. Baron Richards* observed, that such information being on oath, must be *presumed* to be true until the contrary was proved; and

as the plaintiff gave no evidence to show his innocence of the charge, directed the jury to find for the defendant. *Carter v. Thomas* (*Norris' Peake*, 223, *note*). But where the oath has not been credited by the grand jury, it seems formerly to have been the rule that the *onus* was on the defendant; but in the later decisions it has been held that in this case also the plaintiff must give some evidence of the want of probable cause. (9 *East* 361; 1 *Camp*. 199.) *Inclendon v. Berry* (5 *Taunt.*, 187); *Byrn v. Moore* (2 *Johns. R.*, 203); *Secor v. Babcock*.

Badger, for the appellee.

1. The want of probable cause was *prima facie* established by the discharge. This was adjudged by this Court, in *Johnson v. Martin* (3 *Murph.*, 248). As *authority* that case is decisive. It was the duty of the Judge below to declare the law according to it. The court can grant a new trial only for error of the Judge. If he was bound to follow the adjudication made here, it cannot be error. To grant a new trial on this ground, will be equivalent to saying that the Courts below are not bound by the decisions of this Court, but must re-examine, and when they please disregard them. Is the Court perpared to publish such a doctrine to the inferior tribunals, which destroys judicial subordination, and prostrates the supremacy of this Court?

But laying aside the *authority* of *Johnson v. Martin*, as an *opinion*, it may be supported by the clearest and best established principles.

The decision of every judicial tribunal is evidence of the fact on which it is founded. It is evidence conclusive against parties and privies.

In prosecutions, the public, or sovereign, is the nominal accuser; but in fact, these prosecutions must often originate from private persons; and if they were at liberty to use the name of the sovereign, and while actually conducting the prosecution escape upon the ground that they were

not parties on the record, the public law would be (86) abused, without remedy, for the basest purposes of individual malice or resentment. Hence it has been long established, that the actual prosecutor shall be responsible, and he is considered *quasi* a party. The proceedings are evidence against him; not conclusive, because he is not strictly a party; but *prima facie*, because he is substantially a party. It is only upon this ground that the action for malicious prosecution can be sustained at all; for if the prosecutor is not, as to any purpose, deemed a party, how is he responsible for the proceedings in any Court?

The determination upon the prosecution is then evidence against the prosecutor of the fact determined; and if the same question has been decided in favor of the accused, which is now in contest, such decision is *prima facie* evidence. What is the question in this action? It is, was there probable cause or ground for the prosecution? What was the question before the magistrate? Exactly the same.

Probable cause means less than *prima facie* evidence of guilt, namely, such circumstances as warrant suspicion. *Locke v. U. States* (7 Cranch, 339).

Now, if there be circumstances warranting suspicion, the magistrate must commit or hold to bail; if not, he must discharge. By discharging, he has determined there was no ground for suspicion, no probable cause; and, therefore, such discharge is evidence of want of probable cause. It is a judicial determination of the very question.

An acquittal by the traverse jury is no evidence of want of probable cause; not, as supposed on the other side, because evidence is heard from both parties, but because the acquittal does not proceed upon the want of probable cause, but the want of full proof of guilt.

So, of an *ignoramus* of the bill. It is not evidence as to

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probable cause. For probable cause will not warrant the finding of a bill; it requires *prima facie* evidence of guilt which is more. Thus the grand jury is always instructed upon a bill for murder, to find the bill if the fact of killing be brought home by proof to the party charged. To prove the homicide committed is *prima facie* evidence of a murder, and throws the burden of proof on the party charged.

The traverse jury determine, is there full proof of guilt? The grand jury, is there *prima facie* proof? The examining justice, is there ground of suspicion, which is probable cause? Now the last is the very question here, and the discharge by the magistrate is therefore evidence of the absence of such ground of suspicion.

2. Was the evidence of the bad character of plaintiff, after the prosecution commenced against him (his character before being good), and upon matters entirely unconnected with the felony imputed to him, competent evidence? The case has been considered by the other side as similar to the action for slander, and to ask the question seems to decide it. The amount of damages is to be regulated, in law and the nature of things, by the value of that which is lost or assailed, and that is the character at the time of the slander uttered. This loss of character is evidence that the malice has taken effect; it is the very accomplishment of the slanderer's design. To admit it as mitigation, is to determine that a design to injure reputation followed by success, is less injurious than a fruitless effort to injure it. The proposition outrages all notions of justice and of reasoning; and if it be established as law, the spirit of defamation may indulge itself with impunity. No authority has been, nor can be, produced on the other side. The rule laid down in the most respectable writers, as well as in adjudged cases, confines the evidence to character before and at the time of the slander. (*Phillips' Ev.*, ch. 7, s. 3, p. 146); *Id. Leicester v. Walter* (2 *Campb.*, 251, and cases there cited).

HALL, Judge.—I am not disposed to disturb the case of *Johnson v. Martin*, in 7 N. C., 248. In the incipient stage of a prosecution before an examining magistrate, much less grounds of suspicion will induce him to bind over the accused for farther trial, than will

warrant either the grand jury to find a true bill, or the petit jury to convict; and when the accused is discharged because a sufficient ground of suspicion has not been established against him, I can see no reason why such discharge should not furnish *prima facie* ground for an action against the prosecutor. If there was probable cause for the prosecution, and owing to any unforeseen accident it had not been made to appear before the magistrate, he may show it in his defence. I therefore think a new trial should not be granted on account of the first exception taken to the Judge's charge.

As to the second exception, which relates to the rejection of evidence offered by the defendant, I am of opinion it ought to have been received. Evidence in this action may be offered for two purposes; 1st, as an item in the defence when the plea of justification is relied upon; 2d, for the purpose of mitigating the damages, when a complete defence cannot be made out. When it is offered for the first purpose, it would be improper that it should relate to the plaintiff's character subsequent to the time when the prosecution commenced, because a knowledge of the plaintiff's bad character after that time ought not to be considered as a justification of what the defendant did before he acquired that knowledge. But if the plaintiff's character was bad before the commencement of the prosecution, evidence of it might be given, because that bad character, added to other circumstances, might be such a reasonable ground of suspicion as to induce a person, not governed by malicious motives, to take out a warrant to apprehend the person suspected; but a person who possessed a fair character, although in other respects similarly situated, might not be considered so fit a subject for a public prosecution. It certainly requires stronger circumstances of suspicion to commence a prosecution against a
(89) man of good character than against a man of bad character. In this view of the case, character before the commencement of the prosecution may be gone into; but however bad it may be afterwards, it can be no justification of what was done before.

But supposing the defendant to fail in his plea of justification, the next question is, as to the quantum of damages. There is no exact rule by which they can be

measured, as in case of debt or assumpsit; but the inquiry of the jury must be directed to all the circumstances of the case, in order, as well as they can, to fix upon a rule. In order to ascertain the amount of injury done, they may inquire into the character of the person who complains that he has sustained the injury. If his character is good, the damages ought to be greater; if his character is bad, he certainly has not so much cause to complain, and the damages ought to be smaller. In this view of the case, I think the testimony ought to have been received as to the character of the plaintiff. I will illustrate what I have observed by a familiar case. Suppose a man indicted for a malicious prosecution, the jury, whose province it is only to bring in a verdict of guilty or not guilty, ought not to hear evidence of the bad character of the person supposed to be maliciously prosecuted, after the prosecution commenced, because that would be no justification for the prosecution; but if the same evidence went to character before the prosecution, they ought to hear it, for that, added to other circumstances, might be a justification, but the Court, when they fixed the fine, provided it was to go into the pocket of the injured party, instead of the public treasury, might inquire into character both before and after the prosecution.

I will make another remark in this case. If the evidence which the defendant wished to offer in this case, originated from the prosecution which turned out to be malicious, the damages ought on that account to be increased; if it (90) spring from other sources unconnected with it, they ought to be dismissed.

HENDERSON, Judge, concurred with Judge HALL in granting a new trial.

TAYLOR, Chief Justice, on one point differed with his brethren, and gave his opinion as follows:

This is an application for a new trial, on two grounds, viz., of misdirection of the Court in point of law; and the rejection of evidence offered by the defendant as to the plaintiff's character.

1. The principal ground of this action is, that a legal prosecution was carried on without a probable cause, and

this must be expressly proved, and cannot be implied; but when this is established, malice is generally inferred from it; and both are necessary to support the action.

It was said, in the case of *Johnson v. Martin*, that a discharge by a magistrate after a full and fair hearing of the evidence, was a strong indication of the want of probable cause; and the position was then thought to be so obvious as to require neither authority nor argument for its support (3 *Murph.*, 248.)

It is yet believed to be correct, since, in the absence of particular evidence of the manner in which the magistrate discharged his duty, it must be presumed, that he acted in the ordinary and legal manner; and that, upon examining the evidence in the case, he discharged the plaintiff, under a belief that the suspicion entertained of him was wholly groundless.

The duty of a magistrate on such an occasion is thus described: "If, upon inquiry, it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in *such cases only*, it is lawful totally to discharge him, otherwise he must be committed to prison, or give bail." (4 *Bl.*, 296.)

It is the general usage with us, not to discharge (91) the accused, unless it appears that there is no probable ground to suppose him guilty, and in that case the discharge by the magistrate is lawful. The modern practice by magistrates in England has never been adopted here, nor is it by any means called for by the frequency or enormity of crimes. There a magistrate does not usually discharge the accused, unless it appears in the clearest manner that the charge is malicious as well as groundless. (1 *Chitty, Cr. L.*, 89.) Our practice obtains in some of the sister states; for where a person was arrested and brought before a magistrate on a charge made by another of a suspicious felony, and the justice being satisfied that the suspicion was groundless, discharged him. It was held that an action for malicious prosecution would lie against the accuser; and that a magistrate, if he be satisfied that there is no cause for a commitment, may discharge the party accused. (2 *Johns.*, 203.)

It is said to be a bad rule that will not work both ways.

Let us apply this test to the inquiry, what would be the effect of the magistrate's committing a person accused of felony, or binding him in a recognizance to answer the charge? Clearly in an action brought against the accuser for a malicious prosecution, he might adduce this as *prima facie* evidence of the existence of probable cause; and this, unrepelled by evidence on the part of the plaintiff, would be *sufficient* evidence, even in a case where the plaintiff had been acquitted on his trial in Court. It would be competent for the plaintiff to introduce any other evidence to disprove the probable cause, which the magistrate's proceedings proved; but these, unanswered, or answered only by the subsequent acquittal of the plaintiff on his trial, would show that the defendant had probable cause for the prosecution; from the legal presumption that magistrates and courts are indifferent, and without malice, as to the accused. (4 *Mun.*, 465.)

For these reasons, I am of opinion that evidence of (92) a discharge by the magistrate shows the want of probable cause. But it does not preclude the defendant from proving that he had probable grounds of prosecution; nor, as it seems, does the law exact from him the proof of legal grounds for the prosecution; for it will be sufficient to excuse him, if it appear from the circumstances of the case that he really believed the party to be guilty, and was actuated by an honest anxiety to bring him to justice. (*Cro. Jac.*, 193.)

2. On the other question relative to the rejection of the evidence as to the plaintiff's character, it is important to view, in connection, the grounds and principles of this action *for malicious prosecution*, and the rules of evidence as to an inquiry into character.

A very accurate writer on the laws of evidence, in treating on this action, states that the defendant under the general issue may justify the proceedings against the plaintiff, and show that he had a probable cause for instituting them. If the charge against him was for felony, the defendant will be allowed in his defence to give evidence of the general bad character of the plaintiff; for in this case, when the point in issue is whether the defendant acted from malice, and without probable cause, it is material to inquire into the situation of the parties, and whether the de-

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fendant had any reasonable ground for suspecting the plaintiff. Now the notoriety of the plaintiff's character for dishonesty is a circumstance of suspicion not to be disregarded. (2 *Phil. on Ev.*, 115; 2 *Esp.*, 720; 2 *Stark*, 69.)

According to this rule, evidence, as to the plaintiff's character, is admissible only as throwing light upon the question of probable cause; and I have found no authority applicable to this *form* of action, authorizing its admission in mitigation of damages.

But in this case the evidence offered was as to the plaintiff's character after the warrant was sued out against him; yet as it was proved to be good before that period, (93) and furnished no probable ground of justification for the defendant's conduct, it is impossible that any could be derived from its subsequent falling off. Such evidence could have no tendency to throw any light upon the questions in issue in the cause; and its only effect could be to mitigate the damages. But I am not prepared to say, in the absence of authority enforcing a different rule, that a man who was maliciously, and without probable cause, brought before a magistrate on a charge of felony, at a time when his character was good, ought to recover less damages, because after that charge, and possibly in consequence of it, his character had contracted some opprobrium. My own opinion is to affirm the judgment.

By a majority of the Court,

Judgment reversed.

Approved. McRae v. O'Neal, 13 N. C., 166; *Griffis v. Sellars*, 19 N. C., 492.

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From Stokes.

PER CURIAM.—A new trial must be granted to ascertain the facts; no proper case having been sent up to this Court.

BRADY *v.* WILSON.

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From Moore.

It is not actionable to charge a man with burning an out-house not parcel of the dwelling-house.

This was an action of *slander*, tried below before RUFFIN, Judge. The declaration contained two counts; in the first, the words laid were, "that *Carrol Brady* burned his, the defendant's, dwelling house;" in the second, the words were, "that *Carrol Brady* burned his, the defendant's, house."

Upon the trial, there was no evidence given of (94) defendant's having spoken the words laid in the first count; but several witnesses testified that they had heard defendant say "that *Brady* had burned three houses belonging to him (the defendant) in the night time." The houses alluded to and described by the defendant, in conversation with the witnesses, were erected on a piece of land belonging to the defendant, and situated about four miles from his residence. They were log houses, on a small plantation, and had been occasionally occupied as a dwelling house and kitchen by tenants, to whom the defendant let the land from year to year; they were burned down in the night time, but had not in any manner been used during that year; the plantation was untenanted, and fences thrown down. In all the conversations, the defendant described the houses burned as is herein stated, or the witness (as defendant knew) was acquainted with the situation. To one of the witnesses, defendant said that he believed *Brady's* reason for burning the houses was to get one *Chavers* as his tenant the next year, and prevent his living on defendant's land.

On this evidence, defendant moved for a non-suit; the Judge, however, submitted the case to the jury, with leave to the defendant, in case plaintiff had a verdict, to move to set it aside and enter a non-suit, if the words were not actionable. The jury found the defendant not guilty on the first count, but guilty on the second, and assessed damages to \$5. Defendant moved for a non-suit, and the Court ordered a non-suit, on the ground that, although the acts charged upon the plaintiff might flow from a wicked

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and depraved heart, and involve great guilt in *foro conscientie*, yet inasmuch as the words did not impute to him any felony or other crime, the temporal penalty of which would be legally infamous, the action at common law could not be supported. Thereupon, the plaintiff appealed to this Court.

HALL, Judge.—We think that, for the reasons (95) given by the Judge below, the rule for a new trial should be discharged.

Judgment affirmed.

Approved. Skinner v. White, 18 N. C., 472; *Wall v. Hoskins*, 27 N. C., 177; *Stokes v. Arey*, 53 N. C., 66; *McKee v. Wilson*, 87 N. C., 300.

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From Halifax.

Common reputation in the family, is admissible as evidence of a marriage in that family; and it seems that the declarations of a member of that family, are evidence of such common reputation; but such declarations must have been made before any contest had arisen relative to such marriage.

This was an action of *detinue* for slaves, tried below before DONNELL, Judge. The plaintiff claimed title under a parol gift from his mother, *Ann Gunter*, made prior to the year 1806, and offered evidence to establish the fact of such a gift. The mother was living with *Peter Morgan*, the father of the plaintiff, at the time of the alleged gift, but was not his wife at that time. Defendant contended that plaintiff's mother was afterwards married to *Peter Morgan*, and defendant claimed the slaves under two bills of sale, one from the executors of *Peter Morgan* to *Wilson Carter*, bearing date 19th of May, 1812, and reciting a consideration of \$470; the other from *Wilson Carter* to defendant, dated 26th of April, 1813, and reciting a consideration of \$400; there was no evidence but these recitals, of the payment of the purchase money mentioned in the bills of sale. *Wilson Carter* was dead; the witness to the bill of sale last mentioned was examined, but had no recollection of the transaction. It was proved that both

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the executors of *Peter Morgan* had removed from the state, and the witness to the bill of sale which they had made was also a resident of another state.

For the purpose of proving the marriage of *Peter Morgan* with plaintiff's mother, defendant offered to read (96) the deposition of one *Mary Dagget*, which was admitted to have been regularly taken; but was objected to on behalf of the plaintiff as containing only the declarations of the person under whom the defendant claimed, and made subsequently to the plaintiff's title derived from her. The objection was sustained. The deposition was as follows:

"I know nothing of my knowledge, only that she, *Mrs. Morgan*, told me herself that she and *Mr. Peter Morgan* were married.

"I know nothing of any gift for Member; I only heard the report of the neighborhood that *Anna Gunter* gave Rose to *Peter*, her son; and I was at the house of *Mr. Morgan* about six months before his death, and he talked of making his will; and *Mrs. Morgan* requested him to give the negroes that came by her to her children."

Defendant then offered other evidence of the marriage. Plaintiff's mother survived her husband, *Peter Morgan*.

There was a verdict for the plaintiff, and defendant moved for a new trial, on the ground that the deposition of *Mary Dagget* was improperly rejected. A new trial was refused, and from the judgment rendered defendant appealed to this Court.

Badger, for the appellant.

Gaston and *Searwell*, for appellee.

HALL, Judge.—It cannot be contended that the Judge erred in rejecting that part of the deposition which states, that about six months before *Morgan's* death, *Mrs. Morgan* requested him to give to her children the negroes that came by her, because, if it had any effect at all, it would have the improper tendency to invalidate the parol gift made by *Mrs. Morgan* herself, and under which the plaintiff claims title.

With respect to the other part of the deposition, it is very true that the declarations of husband or wife may be

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received to prove whether they were married or not; but it must appear that such declarations have not been (97) made at a time or with a view to serve any particular purpose. (*Norris' Peake*, 23.) In this case, it does not appear when *Mrs. Morgan* told the witness that she and *Mr. Morgan* were married; it might have been, for ought that appears, before or after the commencement of this suit. For these reasons, I cannot say that the Judge erred in the rejection of this deposition. The rule for a new trial should be discharged.

HENDERSON, Judge.—*Common reputation* in the family is admissible as evidence of a marriage in that family; and it is said that the declarations of an individual of that family, are evidence of that common reputation. But such declarations must have been made before any contest had arisen in regard to the marriage. It is necessary that they should have been made not only without any view of benefiting the person making them, but also without a view of benefiting any other; that they should have flowed from a desire only of speaking the truth, which all are presumed to have, when there is no motive to declare the contrary. The person, therefore, who offers such declarations, must show that they were made under such circumstances; it is a prerequisite to their admissibility. It not appearing that those made in the presence of *Mrs. Dagget* were made under such circumstances, they must be rejected; for ought that appears to the contrary, they might have been made on the very day on which her deposition was taken, and with a view to this contest, to aid a purchaser under her husband's executors to increase her legacy, or the fund for the payment of debts, or other legacies, whereby her legacy would be the better secured to her. At all events it does not appear to have been made *ante litem motam*.

The declarations cannot be received as coming from one privy in estate, for she had parted with her estate in the negroes before they were made; the plaintiff is therefore not a privy in the estate which she then had.

As to the other ground of objection, to wit, that (98) it tends to invalidate an act which she had done, I know of no such rule of exclusion. The maxim

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nemo audiendus est allegare suam turpitudinem, is applicable to parties, and not to witnesses. If a person is not infamous, or interested in the event of the cause, he is competent; if his testimony tends to impeach an act which he has done, it goes to his credit.

The deposition must be rejected for the reasons first mentioned.

As I have not considered, so I express no opinion, on what effect such subsequent marriage, and sale by the husband or his executors, would have upon the previous parol gift of a slave by the wife, under our act of 1784, or any other law.

The CHIEF JUSTICE assenting as to the reasons for rejecting the deposition,

Judgment affirmed.

Approved. Smith v. R. R., 68 N. C., 107; *Hodges v. Hodges*, 106 N. C., 374.

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From Perquimons.

A sheriff may, but he is not *bound to*, insist upon two sureties to a bail bond. If he take but one, and he is *insufficient*, the plaintiff may except; but the bond with but one is good, either on *sci. fa.* or in an action of debt.

An assignment of the bail bond by the sheriff to the plaintiff, is not required when the suit is in the County Court; the 17th section of the act of 1777 is confined to the Superior Courts.

In *sci. fa.* against bail, it is not necessary to state the issuing and return of a *ca. sa.* against the principal, though the want of such *ca. sa.* would be a defence for the bail.

This was a proceeding by *Arrenton*, as plaintiff in error, to reverse a judgment which *Jordan* had recovered against him in Perquimons County Court. *Jordan* had sued one *Townsend Elliot* in debt for \$376, and *Arrenton* became bail for *Elliot's* appearance, &c.

After judgment against *Elliot* in the County Court, (99) at August term, 1822, a *ca. sa.* issued against *Elliot*, which was returned, "not to be found," whereupon *sci. fa.* issued against the plaintiff in error as bail of *Elliot*. On the return of the writ, *Arrenton* appeared and pleaded, and at August term, 1823, a judgment was ren-

dered against the plaintiff in error as bail, whereupon execution issued. On the 31st of October, 1823, *Arrenton* gave the defendants in error notice of an intended motion at November term, 1823, for a writ of error in the case; and at that term the writ was allowed, plaintiff having assigned for error—that the County Court found an issue of fact, to wit, that the bail bond was good; that the jury found an issue of law, to wit, that the judgment against *Elliot*, the principal, was not void; that the bail bond was taken for more than double the amount stated in the writ, and therefore void under the constitution; that there was but one security to the bail bond, and, therefore, though debt at common law would lie, yet a *scire fias* under the statute would not, that the *sci. fa.* issued for the amount of the judgment against *Elliot*, when it should have issued for the amount of the penalty of the bail bond, that the *sci. fa.* does not aver a writ of *ca. sa.* ever issued to the proper county against *Townsend Elliot*, the principal, nor does it show that said writ was returned “not to be found;” that the *sci. fa.* does not aver the judgment against *Elliot*, the principal, to be unpaid, unreversed or uncanceled; that it does not appear to whom the said *Arrenton* bound himself as bail for *Elliot*; that it does not appear from the *sci. fa.* that the bail bond was assigned by the sheriff to the plaintiff pursuant to the statute.

The defendant in error pleaded, in the Supreme Court, “*in nullo est erratum*,” and the Court, PAXTON, Judge, held that there was error, and reversed the judgment of the County Court; whereupon the defendant in error appealed.

Hogg, for appellant.

L. Martin, contra.

TAYLOR, Chief Justice.—It is necessary to notice (100) but three of the errors assigned in this case, the others being such as are either cured by the statute of *Jeofail*, or might have been availed of in an earlier stage of the proceeding. The sheriff having taken but one bail was at his own risk; and if that one was insufficient, the sheriff might have been rendered liable upon exception taken thereto by the creditor in due time. The sheriff

may, if he pleases, insist upon a bail bond with two sufficient securities, but he is not bound to do so; and this rule is equally applicable to a *scire facias* and an action of debt.

The assignment of a bail bond, by the sheriff to the plaintiff, is not necessary, when the suit is brought in the County Court. The provision of the act of 1777, *ch.* 17, is confined to the Superior Courts, and no similar one extends to the County Courts.

This *scire facias* is informal; but it is no necessary part of a *scire facias* against bail to state the issuing and return of a *ca. sa.* against the principal. The want of a *ca. sa.* would be a defence for the bail, on the *sci fa.* (*Lutw.*, 1285), and if one had not issued before the *scire facias*, it might be assigned for error. (*Cro. Car.*, 481.) But in this case it is stated that a *ca. sa.* issued from the sessions where the judgment was recovered, and returned to the ensuing sessions "not found." There is, therefore, no sufficient reason to reverse the judgment.

HALL, Judge.—In this case the parties are at issue upon the errors assigned. A motion is made by the defendant in error, under the act of 1824, *ch.* 5, to amend the record, and thereby cure the errors (if any there be) which have been assigned in the writ of error. What appears to me to be the true construction of that act, I have expressed in the case of *Matlock v. Gray, &c.*, decided this term in this Court. If the Court from which the record comes could not grant the amendments now prayed for, after final judgment pronounced by it, this Court cannot permit them to be made.

Another objection is made to the time at which (101) the writ of error was sued out from the County Court, it being at a term subsequent to the one at which final judgment was obtained.

The act of 1777, *ch.* 115, *sec.* 76, declares, that when any person shall be desirous of prosecuting a writ of error, he shall move the County Court where such suit is, or hath been pending, for a writ of error. The 79th *sec.* declares, that if it shall so happen that there shall not be thirty days between the *last* day of the term or *hearing* in the County Court, and the next term of the Superior Court to which such appeal shall be made, or writ of error allowed, a transcript of the record shall be filed in the Su-

perior Court the term succeeding, &c. I recite this clause, because it appears to me that the party can only sue out a writ of error at the term at which judgment against him is finally given in the words of the act, "all the last day of the term or hearing in the County Court." In confirmation of this, the 80th sec. declares, "that in every County Court, &c., when any appeal shall be prayed, or writ of error allowed, the clerk of such Court shall make a record of the proceedings in such cause, and shall, within ten days after the final adjournment of the term in which the cause shall be heard, give an attested copy of such record, &c., to the appellant or plaintiff in error." This clause, I think, incontestably limits the time of suing out writs of error from the County Courts to the term at which judgment shall be finally rendered.

Much inconvenience would attend the practice of suing them out at any indefinite period of time. No provision is made for notifying the opposite party of the time of moving for them; and if they might be moved for at any time, the opposite party would have no day in Court; it might be done after the debt was discharged.

When application is intended to be made to the Superior Court, under the 47th sec. of the act, in order to (102) guard against surprise, provision is made for notifying the opposite party, which no doubt would have been done as to applications to the County Courts if it had been intended that they might have been made at any indefinite period. I therefore think the County Court cannot grant writs of error at any term after the expiration of the one at which judgment is finally rendered. But, taking it for granted that the defendant is too late in availing himself of this objection, as issue has been joined on the errors assigned, it is necessary to consider of those errors. The one which states that the bail bond was not assigned by the sheriff, would seem to be formidable, but it appears that the act of 1777, *ch.* 118, which speaks of process returnable to the County Courts, does not require an assignment to be made by the sheriff. That assignment as error may, on that account, be got clear of. I also concur in opinion with my brethren, that the other errors assigned are not sufficient to reverse the judgment of the County Court.

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By the Court,

Judgment affirmed.

Approved. Gray v. Hoover, 15 N. C., 475; *Cochran v. Wood*, 29 N. C., 215; *Trice v. Turrantine*, 32 N. C., 543.

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From Caswell.

A variance between the writ and declaration, the former being in debt, the latter in assumpsit, is fatal even *after verdict*.

A note not assignable within the statute, cannot be declared on, the consideration must be stated and proved, the note can only be evidence to the jury.

Where a note is made payable on a contingency, and the contingency is of such kind as shows no benefit to the one or injury to the other party, the note of itself is no evidence of a consideration, but proof of a consideration must be given independent of the note.

This was an action of *debt*, brought on the following instrument:

I promise to pay John Stamps for John W. Graves, the sum of two hundred and eighty-six dollars and 32-100, out of a bond when it shall (103) be collected on James Daniel for the sum of four hundred and fifty-two dollars, due the 1st of March, 1820, eighteen hundred and twenty. 30th Dec. 1819.

(Signed) A. Graves.

The declaration was as follows:

John Stamps complains of *Azariah Graves*, in custody, &c., for that whereas the said *Azariah Graves* heretofore, to wit, on the thirtieth day of December, in the year of our Lord one thousand eight hundred and nineteen, to wit, at Caswell, aforesaid, for value received, made his certain promissory note, bearing date the day and year aforesaid; and thereby then and there promised to pay to the said *John Stamps* for *John W. Graves*, the sum of two hundred and eighty-six dollars and 32-100 out of a bond when it should be collected on *James Daniel*, for the sum of four hundred and fifty-two dollars, due the 1st of November, 1820; and the said *John Stamps* in fact saith that afterwards, to wit, on, &c., at, &c., the said money was collected on the bond aforesaid of the said *James Daniel*; by means whereof the said *Azariah Graves* became liable

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to pay, &c., and being so liable, in consideration thereof, promised, &c.

And whereas, also, afterwards, to wit, on, &c., the said *Azariah Graves* at, &c., for value received, made his certain promissory note, bearing date, &c., and thereby then and there promised to pay to the said *John Stamps* for *John W. Graves*, the farther sum of, &c., out of a bond when it should be collected on *James Daniel* for the sum of, &c.; and the said *John Stamps* in fact saith, that afterwards, to wit, on &c., at, &c., the aforesaid bond on *James Daniel* was collected by the said *John W. Graves*, by means whereof the said *Azariah Graves* became liable to pay, &c., and being so liable, in consideration thereof, promised, &c.

And whereas, also, afterwards, to wit, on, &c., the said *Azariah Graves* at, &c., for value received, made his certain promissory note, bearing date, &c., and thereby then and there promised to pay to the said *John Stamps* (104) for *John W. Graves*, the farther sum of, &c., out of a bond when it should be collected on *James Daniel* for the sum of, &c.; and the said *John Stamps* in fact saith, that afterwards, to wit, on, &c., at, &c., the aforesaid bond on *James Daniel* might have been collected, and that the collection of the said bond was prevented and defeated by the wilful act of the said *John W. Graves*; by means whereof the said *Azariah Graves* then and there became liable to pay, &c., and being so liable, in consideration thereof, promised, &c.

The fourth count was for money lent and advanced.

The fifth, for money had and received.

The defendant pleaded the general issue and payment, and on the trial before PAXTON, Judge, the plaintiff proved the execution of the instrument; that *John W. Graves* brought suit against *James Daniel* on the bond mentioned in the declaration, and obtained judgment; that *Daniel* appealed to Caswell Superior Court, and gave as securities for his appeal *Charles Wilson*, *John G. Wilson*, *Jeremiah Dixon* and *James Clay*; that judgment was rendered in the Superior Court against *Daniel* and his securities, and execution issued thereon against them; that on this execution the sheriff returned that, exclusive of the costs, \$236 had been paid by *Jeremiah Dixon*, and that no property could

be found to satisfy the residue. Plaintiff also proved that *James Daniel* and *James Clay* were insolvent, and that *Jeremiah Dixon* made the payment above stated in behalf of himself, and *Charles* and *John G. Wilson*; that the payment was made under an agreement between *Solomon Graves*, as agent for *John W. Graves*, and *Dixon* and the *Wilsons*, that they, the securities to the appeal, should be discharged from all farther liability for the balance of the debt, and they were discharged accordingly.

The defendant offered to prove by parol, that the instrument was given by the defendant as agent for *John W.*

Graves, but the Court rejected the testimony; defendant (105) contended, also, that it was incumbent on the plaintiff to show a consideration for the instrument, but the Court held otherwise.

It was admitted, that at the time *Dixon* and the *Wilsons* were discharged, the defendant was not the agent of *John W. Graves* in collecting the debt from *Daniel*; and also that no part of the money raised on the execution against *Daniel* and his sureties was ever received by the defendant.

The jury, under the charge of the Court, gave a general verdict for the plaintiff, and the case stood here by appeal of defendant, on a rule to show cause why a new trial should not be granted.

Seawell, for the appellant.

1. The writ is in debt, and the declaration in assumpsit. This is such a variance that the plaintiff cannot have judgment.

2. The first count of the declaration is defective; it does not show by whom the bond was collected. So is the second count, for it alleges a collection by *John W. Graves*, and no receipt by the defendant is shown. The third count is plainly defective, for it shows no collection, but instead thereof that the collection was prevented by the wilful act of *John W. Graves*. He is a stranger, and his default is not equivalent to a collection; this is true only of the act of the party himself. As to the fourth and fifth counts, for money lent, and money had and received, there is no evidence to support them, as will be shown; but at present it is sufficient to say, that several of the counts be-

ing bad, and the verdict general, the plaintiff cannot have judgment.

3. It was incumbent upon the plaintiff to show an actual collection of the money due upon the bond, according to the terms of the contract on which the action is brought. But a collection by *John W. Graves*, even if proved, is not sufficient, for a collection by the defendant is to (106) be intended. But there was no collection of the bond; a part was received, and the residue released by *J. W. Graves*; and if a release or discharge by the party be equivalent to a collection, such act by a stranger will not be. Where the liability depends on the act of one not party to the contract, a performance must be shown, nothing is equivalent to it.

4. Even if the plaintiff was not bound, in the first instance, to show a consideration for the promise, yet here he is not entitled, for the case shows there was not a consideration. The very terms of the note rebut the idea of any consideration. The promise is made for *John W. Graves*; no benefit appears to the promissor, no injury to the promisee. The defendant was discharged from his agency for *J. W. Graves* before the collection of any part of the bond; no part of it was received by him; and the promise, which was *nudum pactum* at its making, never became binding by any subsequent benefit to him, or loss to the plaintiff.

But, fifthly, the Judge should have required proof of a consideration from the plaintiff. The promise being without seal, required a consideration, and its existence is not presumed. A case of the very highest authority shows, not only that a consideration is necessary and must be alleged, but that it must be proved. The contrary notion stated by Mr. Justice *Blackstone* as to promissory notes, is without foundation. *Rann v. Hughes* (7 Term, 346, n.; 1 Fonb., 343).

Badger, for the appellee.—As to the variance. The *capias ad resp.* is not an original writ, and a variance between that and the declaration is not matter of any consequence. The *capias* is mere leading process, which presupposes an original; its whole object is to bring the defendant into Court, to receive a copy of the declaration which

contains the cause of action, and to which the defendant pleads. As soon as the defendant is in Court, and (107) the declaration delivered, the process is at an end, its whole function being performed. It is no part of the record, and a defect in it, or a variance from the declaration, is no ground for plea in abatement, demurrer, or motion in arrest of judgment. No advantage can be taken of such defect or variance *ex rigore justitiæ*, for the reason that the *capias* is no part of the record. The party may apply to the discretion of the Court to set aside the proceedings, which will be done only where the attainment of justice requires it. These positions are fully supported by the case of *Hale v. Finch* (2 *Wilson*, 393); *Drew & wife v. Rose* (2 *Ld. Raym.*, 1398).

But if the writ in this case be considered an original, the objection cannot prevail. For the Courts never would, at any period, notice such a variance, but upon *oyer* of the original, unless the variance appeared upon the face of the declaration; and it has been long settled, that the defect even thus appearing upon the declaration, will not be noticed unless *oyer* has been had of the original. *Ellery v. Hicks & wife* (4 *Mod.*, 246).

But since the case of *Brats v. Edwards* in the *K. B.* (*Doug.*, 227), and that of *Ford v. Burnham* in *C. B.* (*Barnes*, 340) the Courts, by refusing *oyer*, have prevented all advantage for the want of or for a vicious original, or for a variance. (1 *Saund.*, 318, *a. n.*, 3.)

But this being an objection taken *after verdict*, it cannot prevail, in whatever character the writ may be considered, whether as an original or process. For the statute of 5 *George*, 1, *ch.* 13, enacts, "that after verdict, judgment shall not be arrested for any variance, whether in form or substance, in any writ original or *judicial*, from the declaration or other proceedings." If this statute is in force here, it is of course decisive of the question.

CHIEF JUSTICE.—It is in force. It has been so decided in this Court.

Badger.—The case being then freed of this technical objection, is to be considered upon the questions made (108) in the Court below and presented by the case: 1. Was it incumbent on the plaintiff, *in the first in-*

stance, to prove a consideration? 2. Is the defendant personally liable on the note?

1. The rule laid down in *Rann v. Hughes*, is not denied. There must be a consideration to support every agreement not under seal; and where it appears to be without consideration, though in writing, it has no legal obligation. But the question here is, not whether a promise without consideration can be enforced, but what is *prima facie* proof of a consideration? Was the plaintiff bound to offer proof *dehors* the note in the first instance, or was the execution of the note sufficient proof of consideration until some evidence of the contrary was produced by the defendant?

It is admitted, the note on which this action is brought is not negotiable, and therefore derives no help from the statute of *Ann.* But without the aid of that statute we hold, that a written promise to pay is presumed to be founded upon sufficient consideration, and throws the *onus* of proof on the other side.

The case of *Meredith v. Chute* (2 *Ld. Raym.*, 759), was determined before the statute of *Ann.*, and it was held by the Court clearly that the signing a note is evidence of a good consideration against the maker, although the note expresses none on its face, and none is alleged. This doctrine is demanded by the necessities of mankind, and founded on a knowledge of human conduct and motives. It is not to be presumed that a man will make a written promise to pay money (which shows deliberation) unless he is under a sufficient obligation to do it; for men are not prone to part with money without motive.

The distinction is clear between the necessity of a consideration and the obligation of proving it. Even in commercial instruments, a consideration is always material. It is true if a promissory note made without consideration be assigned for value, the want of consideration between the original parties cannot be objected against the assignee who has paid for it. Whether the consideration be prior to the making of the note, or arise afterwards upon an assignment, is immaterial; but a consideration there must be; for it is clear from a variety of cases, that a note made without consideration, and transferred by an assignment merely gratuitous, cannot be enforced by

such assignee, either against the maker or the indorser. It is but a promise in writing, and cannot create a liability if the want of consideration appear. Yet what is the rule as to the burden of proof? Was it ever said that a plaintiff should be non-suited for not producing evidence of the consideration? The law and uniform practice is to the contrary. Proof of the bill, the note or the indorsement, is sufficient proof of consideration to entitle the plaintiff to recover. (1 *Selw. N. P.*, 241, 294; *Chitty on Bills*, part 1, ch. 3, p. 62.)

2. The defendant is personally liable upon the note, and the fact that he ceased to be the agent of the party for whom he contracted, cannot affect our right, or discharge him from his engagement. If one covenant for another, and execute the deed in his own name, he is personally liable. *Appleton v. Binks* (5 *East*, 148). So where the promise was "we as solicitors of A. B., &c., undertake," &c. *Burrell v. Jones et. al* (3 *Barn. & Ald.*, 47). So where the note was in these words, "we, as executors of the late T. T. jointly and severally promise to pay." *Childs v. Monins* (2 *Brod. & Bing.*, 460). Contracts by agents and servants of government are exceptions. (1 *T. R.*, 172, 674, and 4 *Mass. R.*, 595.)

As to the declaration. The first count alleges the collection, and that is enough. It is immaterial by whom the collection was made; the promise to pay when the bond should be collected. As to the second count, a collection by *J. W. Graves* is of course sufficient, if the liability arise upon a collection merely, without regard to the person making it. The third count alleges, that the col-

lection was prevented by the wilful act of *J. W.*
(110) *G.* That is sufficient; the defendant has contracted for him, and he is not to be considered a stranger as to this contract, at least by the defendant.

But if any of these counts should be bad, the Court will allow us to enter up the verdict upon the counts for money had and for money lent. The note is evidence upon those counts, and they are good; and it appears from the case that no evidence was given but the note. If this cannot be done, the Court will permit us to amend by striking out the defective counts, in order to avoid a technical objection, and to attain the justice of the case. The objection

does not concern the merits; the case was not brought here upon any such objection; and if the law is with us upon the questions presented by the "case," we hope we shall not now be prejudiced by the defects of the declaration, when there are counts which the evidence will support, on which we can have judgment.

HENDERSON, Judge, delivered the opinion of the Court as follows:

It is objected by the defendant, that the writ is in debt, and the declaration is in case or assumpsit.

The plaintiff answers, that this objection does not appear, *oyer* not being craved of the writ; and it is likened to the original in England, and English authorities are cited which fully support the answer. But the objection, as it exists here, is not answered; the writ issuing from the same Court is upon record without its being put there upon the prayer of *oyer*. In England, the original issuing from a different Court (the Court of Chancery) can only get on the records of another Court, but by obtaining *oyer* of it.

It is next answered by the defendant, that the writ being only process, a variance between it and the declaration is immaterial; that the defendant in Court is bound to plead to any declaration; and English authorities (111) are cited, which also fully establishes this position.

This answer requires some investigation. In England no possible injury can arise to any one by thus disregarding the process, neither the bail to the writ, bail to the action, or the defendant. In this country, both the bail and the defendant may be materially injured by it. In England, the bail to the writ are discharged by the defendant's appearance, the condition of the bail bond is fulfilled. The bail to the action cannot be injured, because they contract their obligation after appearance, and this obligation is evidenced by what is called the bail form, in which the particular action is specified in which they are bail, and they can be made answerable in no other. The party cannot be injured, because no steps can be taken against him until he appears in Court, not even to declare against him; and if he is surprised by the charge, he is entitled to time to plead. The process may, therefore, very properly be considered as *functus officio*, and be disregarded.

But in this state the bail to the writ are also bail to the action; and if the process may be disregarded, they may be charged with a judgment in a different action from the one in which they became bail. But it is said, if the action is varied, the bail are discharged. Not so, I answer, if it is a matter of course to disregard the process; it is only by regarding it that such consequence follows, but above all, the heaviest consequences may fall on the defendant. In England, a default is for withdrawing after having been in Court; no steps can be taken by the plaintiff until he has got the defendant in Court; if after having been in Court he withdraws, it is an admission of the facts alleged against him. By the construction put upon our Court law of 1777, a default may as well be before appearance as after; and we are daily in the habit of taking judgments by default against a person who has not appeared in Court, some of them final, some interlocutory. If it were a matter of course to disregard the process, and that a declaration might be filed for any other cause of action, a defendant, who might have been arrested for some paltry sum which he disregarded, and therefore did not appear to defend it, either because it was due or for any other cause, might have a final judgment entered against him by default for half or the whole of his estate; or he might be sued for one thing which he admitted himself culpable in, and charged in another which he would have denied. And it is no answer to say, that the same law requires a copy of the declaration to be served on the defendant three or five days before Court; this omission must be shown by *plea* of the defendant; and if he makes default, he is not there to plead. The Court will only see that the original declaration is filed in Court within the prescribed time. These inconveniences would result from adopting the English practice; which is admitted to be proper there, but combined with our other rules of practice would be ruinous here. Nor is it any reason why they should be adopted here, that upon application to a Judge a *supersedeas* might be obtained; it might, but it is best to prevent the mischief. A man might have his property sold, or his person imprisoned, before he could have an opportunity to redress himself. I, therefore, think that the variance is fatal. But as this is a new case, and the Court

below may allow of an amendment upon equitable terms, and there are good grounds for granting a new trial, the Court will not arrest the judgment, but leave it to the discretion of the Court below to allow an amendment, if it should think proper.

The next objection is to the declaration. The counts upon the note are bad. This is not a note within the statute of *Ann*, or our act of 1762. Were it so, it might be declared on, for these statutes make notes which came within them evidence of a debt, and not barely evidence of a promise, as such notes were before the statute. But this note being payable only on a contingency, and not absolutely, is unaffected by the statute. A note for (113) money before the statute, was evidence of so much money lent, or had and received; it was given in evidence on counts like these, and the Courts instructed the jury that they were well warranted in drawing such conclusions; for, from the nature of man, it was not presumable that he would give this deliberate evidence of his promise, without he had in his hands so much money belonging to the payee. But this was only presumption of fact; the law raised no such presumption, until the statute raised it. This note being a conditional promise to pay, on a contingency which might never happen, no such presumption can arise; it does not afford evidence that the plaintiff had lent the sum expressed in the note, or that the defendant had received such a sum for the use of the plaintiff; for if such had been the case, the plaintiff would not have accepted a note payable only on a contingency in satisfaction thereof. But if it is said, that at least it is evidence of some sum having been received, or some sum lent, it may be asked how much? Such a sum as would make the bet equal, whether *Daniel's* note would ever be collected? We have no means of ascertaining how much this would be. Besides, this would be a species of gambling; to make the most of it, it would be left to mere conjecture what the consideration was; it might be good and it might be bad. There can be no harm in compelling the plaintiff to set out in his declaration what the consideration was. I am satisfied that the one stated in the declaration is not the true one, to wit, for so much money had and received by the defendant to the use

of the plaintiff, or so much money lent by the plaintiff to the defendant, and that the Judge ought to have so instructed the jury. If the real consideration had been stated, and the money on *Daniel's* bond collected either in fact or in law, the Court could have passed on the contract, and given the plaintiff a judgment, if in law he was entitled to one, if not, a judgment for the defendant. As it is, it is all conjecture. For this omission of the Judge on submitting an issue to the jury without any evidence (114) to support it, I think that a new trial should be granted.

I do not intend to be understood as conveying an idea that only such notes as are within the statute can be offered in evidence in support of the money counts, for the statute has no operation upon this question. A note for corn, cotton, or any other article, is certainly *prima facie* evidence of the maker's having received an adequate value; it is, therefore, evidence of such consideration *prima facie*. But I think these contingent notes, which may never become payable, do not raise such a presumption; in fact, the presumption which it raises is too uncertain. It requires proof of what the consideration was; and if proof must be made, the fact of the consideration must be stated in the declaration.

I should have thought that the statutes before mentioned had made notes which were within them conclusive evidence of a debt; for they declare, that when any person shall make any note for the payment of money payable to any other person, the money expressed to be payable therein, shall be considered to be due and payable to the person to whom the note is payable; thus making the note evidence of a debt by a conclusion of law, and therefore by the proof of the note, the debt is proved, and that the want of a consideration could be no defence, for a consideration is not required by the statute to make the note evidence of the debt; that notes within the statute by its operation stood upon the same grounds in this particular as specialties, which were good without a consideration; for I think that *Mr. Blackstone* is wrong when he says that a bond, from the solemnity of the sealing, carries with it an evidence of a good consideration; a voluntary bond is obligatory at law, and equity will not for that cause

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alone interfere, even if the want of a consideration appears upon its face, it is in the nature of an executed contract. The symbolical delivery of the obligor's seal, having the effect of executing the original contract, and when (115) an action is brought upon it, is not to enforce the original contract, which being executory would require a consideration, but to convert the symbolical performance into an actual one, as it were to compel the obligor to redeem the symbol. If a gift of a chattel is made and there is no delivery, such gift cannot be enforced for want of a consideration; the contract is voluntary and requires a consideration to support it; but if a delivery is made, the property passes without a consideration, it is then an executed contract, and the want of a consideration is immaterial. I mean to say, that a bond may be declared on without stating a consideration, and the defendant shall not impeach it by proof of the want of a consideration. A note within the statute has the same effect as a bond; it is evidence of debt, and is good without a consideration. To permit the defendant to impeach it for want of one, is, I think, in the teeth of the statute. But those who came immediately after the statute, said the statute affected no charge in them between the parties, and confined its operation to cases after assignment, so far as regarded a consideration; and I believe it is now the settled course of practice to permit the maker of a note, as well when the note is within as when it is without the statute, to impeach it for want of a consideration, in a suit with his payee, confining the operation of the statute to cases where there is an endorsement for value. Let a new trial be granted.

Judgment reversed.

Approved as to first point. *Glisson v. Herring*, 13 N. C., 156. *Overruled* as to second point. *West v. Rutledge*, 15 N. C., 31.

(116) Doe on demise of TAYLOR v. ROE and SHUFFORD.

From Iredell.

Common reputation is evidence in questions of boundary; and in ascertaining Earl Granville's line, astronomical observation is a more

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certain mode (the latitude of the line being given) than an actual running of the line from a certain point designated on the sea shore as its beginning.

The sovereign power cannot be estopped. Where the crown, in 1768, granted lands to A which it had previously granted to Earl Granville, the grant in 1768 was void; and as the state succeeded upon the revolution to Earl Granville's right to the land, a grant made by the state since, shall be preferred to the royal grant in 1768.

Ejectment. The plaintiff's lessor claimed the land in dispute, lying in Lincoln county, by virtue of a grant issuing to his father in 1768 from the crown of Great Britain.

The defendant claimed the land under a grant from the state of North-Carolina of recent date; and contended, that the land was within the boundaries of *Earl Granville's* grant, which being antecedent to that under which plaintiff claimed, the latter conveyed nothing to plaintiff.

On the trial below, before NASH, Judge, it appeared that, from the year 1753, acts of the legislature of North Carolina had been passed, at various times, up to the year 1779, which acts call for and point out *Earl Granville's* line as the boundary between different counties; that in the year 1772, the line so called for by those acts had been actually run and marked as *Granville's* line by commissioners appointed for that purpose, and has ever since been reputed the line; but it did not appear how the line so run was ascertained to be *Granville's* line; nor did it appear to have been ascertained for any other purpose but that of marking the limits of the several counties bounded by it. The land in dispute lay to the northward of the line run as *Granville's*, several miles.

The defendant proved that the latitude of the town (117) of Lincolnton had been ascertained by observation, and that from Lincolnton to the *Granville* line extended would be about two miles going due north; and farther, that from the observation which had been taken, the latitude of *Earl Granville's* line, as given in his grant, would make the line pass to the northward of Lincolnton between two and three miles.

On the part of the plaintiff it was contended, that although the grant of *Earl Granville* called for a parallel of latitude as the southern boundary of the territory granted in it, yet it called also for other boundaries more certain in their nature and more easily ascertained, viz., Chickma-

comack inlet, and the town of Bath; and that from a point north of Bath, as specified in the grant, *Earl Granville's* line was to be run west;* and that he could not be deprived of his land, unless it was shown that it lay to the northward of that line so run, which was denied to be the same with the line run and marked as *Earl Granville's* line.

It was farther proved, that according to the maps examined by the witness (*Mr. Mushat*), the 35th degree of north latitude, measured on those maps by the scale upon them, was twelve miles to the south of the line laid down by them as the division line between the Carolinas; from the 35th degree of north latitude, to the land in dispute (supposing it to be due north from Lincolnton) would (118) be forty-three miles over hilly, broken ground; that the maps were not accurate, and that thirty-four minutes would measure thirty-nine miles, and the witnesses could not say, that the distance of forty-three miles mentioned above, would be more than thirty-nine miles *air measure*.

The plaintiff, and those under whom he claimed, never had actual possession of the land, but living in another county, the defendant had acted as his agent for many years in taking care of the land and paying taxes for it. Defendant admitted himself to be in the adverse possession.

The Court charged, that if the jury were satisfied that the land in dispute was within the chartered limits of *Earl Granville's* land, the plaintiff was not entitled to recover. There was a verdict for the defendant, and a new trial moved for on the ground that the jury should have been instructed that the mode by which the defendant ascertained the situation of *Granville's* line was not such as to entitle it to any weight in deciding the question where

*“ Bounded to the north by the line that divides Carolina from Virginia, to the east by the great western ocean, commonly so called, and as far southwardly as a cedar stake set upon the sea side in the latitude of thirty-five degrees and thirty-four minutes at north latitude, being six miles and a half to the southward of Chickamacon inlet, from that stake, by a west line which passed twenty-five feet to the southward of the house wherein Thomas Willis liveth, and so west as far as the bounds of the charter granted to the lords proprietors of Carolina, by his majesty King *Charles* the Second, which west line went one thousand six hundred and sixty poles to the north of the south end of Bath town.”

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that line was; and farther, that the jury should have been instructed that, although the land was to the north of *Granville's* line, yet the plaintiff was still entitled to recover, as the defect in his title was cured by the Bill of Rights.

A new trial was refused, and from the judgment rendered plaintiff appealed.

Wilson, for the appellant.

1. The southern line of *Lord Granville* does not depend upon where the latitude of thirty-five degrees thirty-four minutes is. The grant from *George*, 2, by which the boundary is described, calls for a *stake* set upon the sea side in that latitude. (1 *N. R.*, p., 35.) The stake is the object called for; the latitude but a guide to it. The stake is a definite point, and controls the call for a parallel of latitude in which it was supposed to be placed. And though the line thence is west, yet it is described as passing twenty-five feet to the southward of the house (119) wherein *Thomas Wallis* lived, and a certain number of poles north of the south end of Bath town.

To ascertain the line, the defendant must begin at Bath, or *Wallis'* house, and extend it by actual survey west. The latitude is uncertain, and cannot be ascertained with precision. The commissioners on the part of this state and South-Carolina, aided by men of science, differed about it. As to the surveys made by authority of the general assembly, they were not proper evidence. They were taken to ascertain the boundaries of counties, and proved nothing as to this controversy. It appears upon the case, that the defendant's title was acquired dishonestly, and the Court ought to hold him to strict proof.

2. The King granted this land to *Earl Granville*; then granted a part of the same to the plaintiff. Afterwards the state (succeeding to the rights of the King, the former sovereign) acquired *Granville'* title by escheat. The state is *estopped* by the King's grant, under which the plaintiff claims; and the title acquired by escheat shall enure to the benefit of the plaintiff. This, I admit, sounds like strange doctrine, but I think it can be supported. The contrary opinion owes its origin to the superstitious vene-

ration of our English forefathers for their monarchs, and ought not to subsist in a republic.

A grantor executes a deed of conveyance, and afterwards receives other title to the estate; he and his heirs are estopped by the first deed. *Mosser et al. v. Sebastian et al* (4 *Bibb.*, 436).

Where the legislature, by resolve, declared that a monument mentioned in the resolve was, and should be considered as the one intended in an Indian deed under which a title was derived to certain proprietors, it was held the commonwealth was thereby *estopped*. (10 *Mass. Rep.*, 155.)

In *Co. Lit.*, 270 *b.*, a case is stated, where, even in England, the King shall be *estopped* by a deed.

(120) A record or patent cannot be contradicted. (*Co. Lit.*, 260 *a.*)

If the King made a grant through mistake, unless there be fraud, it shall be good. (6 *Coke*, 55, *the Duke of Chandos' case.*)

It is laid down by *Mr. Harper*, in argument, in 7 *Cranch*, 617, that a state is estopped to dispute its grant; and the principle seems admitted by the Court, in page 622.

Consequently, as there is no fraud alleged in obtaining the first grant under which we hold, the state is *estopped* by it to deny that it passed a good title; and the defendant, claiming under the state by a subsequent grant, is *estopped* likewise.

Badger, for the appellee.

1. As to the estopped. It is not necessary to examine whether the doctrine that the King cannot be estopped, had its origin in a superstitious veneration, or in a rational regard for the interests of the public; nor shall I inquire whether republicans should not feel as high respect for sovereignty when vested in the people, as is paid to it by subjects when formed in the person of a monarch: but shall content myself with assuming this position, that the state stands upon a footing not inferior to that occupied by a citizen; and if it can be shown that a mere citizen, under the circumstances of this case, would not by law be

estopped, I shall infer, with confidence, that the state is not.

The counsel on the other side seems to have taken it for granted, that any conveyance by which a title professes to be passed, *estops* the grantor to claim any title subsequently derived by him. This position is entirely without warrant. Those conveyances which operate without transmutation of possession, as releases, grants of incorporeal hereditaments, and deeds which owe their operation to the statute of uses, have no such effect of themselves; they pass only what the grantor hath, and if he hath nothing they pass nothing. If he afterwards acquires title, it enures to himself, and not to the grantee. But if a warranty be added to such conveyance, then, by force of the *warranty* and not of the conveyance, the grantor is estopped, and title subsequently acquired shall enure to the grantee.

Thus, a grant passes only the interest which the grantor hath at the time of the grant. So of a release. (*Cruise Dig. Deed.*, ch. 4, s. 43.)

Hence a grant for a greater estate than the grantor hath, is *merely* void. (s. 18.)

Hence also, if a man grant a rent out of the manor of Dale, when in truth he hath nothing in the manor, if he afterwards purchase the manor he shall hold it discharged from the grant. (s. 43, and *Perk.* s. 65, there cited.)

So, if a son *release* to the disseisor of his father, living the father, he may, after his father's death, enter against *his own* release. (*Cruise Deed*, ch. 6, s. 46.)

"Yet a release of all a man's right," says Ch. B., *Gilbert*, "supposeth that he has a right." Then the estoppel does not arise (as the counsel on the other side seems to think) from the execution of a deed, which supposes a right in the grantor and professes to transfer it to the grantee.

But in the case of the disseisor of the father, if the son release in the life of the father with *warranty*, then after the father's death he is barred *by force of the warranty*. (*Shep. Touch.*, ch. 8, p. 183.)

A *fine* is always made with *warranty* express in practice, and if none be expressed it is implied. (*Cruise*, title *Fine*, ch. 2, s. 34, 35.)

To the validity of a *feoffment*, nothing is necessary but

possession. It always passes an estate, though the feoffer have nothing in the land; the estate may be wrongful, and may be determined by the entry of him who hath title, but still it is an estate. Thus a feoffment by tenant (122) for years, passes the fee, by force of the *livery* by which actual possession is transferred and the land delivered. And hence it is, that a feoffment barreth and excluded the feoffer of all present and future rights and possibilities of right. And this efficacy of a feoffment is said to be peculiar to itself, arises from the livery which accompanies it, and does not belong to fine, recovery, or other conveyance. (*Cruise, Deed, ch. 4, s. 32, 33, 34. Shep. Touch., 204; Co. Lit., 9 a.*)

Besides, before the statute of *quia emptores* (which destroyed subinfeudations) a warranty was attached to every feoffment; if not expressed, it was implied from the word *dedi*; and since the statute, such warranty is *implied* to bind the feoffer during his life.

The inference is clear from those cases, that no grant, release, or deed operating under the statute of uses, creates any bar except by force of an express warranty annexed to it. This position is not opposed by anything cited on the other side. The case from 10 *Mass. Rep.* has no relation to the doctrine of estoppel as we are now considering it. It was merely this: doubts existing as to a boundary mentioned in an Indian contract, the legislature, by a resolve, declared and established that boundary. And it was held, that as this resolve was intended for the very purpose of removing the difficulty of proof as to where the object referred to in the contract was, and to establish a certain boundary, the resolve, *having the force of a law*, was conclusive, and could not be contradicted.

The case from 4 *Bibb.* means a deed with *warranty*; and if so, it consists with the view here presented; if it means otherwise, it will hardly be deemed of sufficient authority to overturn the principles established by the authorities I have referred to, to which it stands in direct opposition.

The case in *Co. Lit.*, 370 *b*, is, that a warranty and assets descended upon *King Edward I.*, as the cousin (123) and heir of *Edmund Earl of Cornwall*; and it was held that *King E.* was barred "by the said war-

ranty and assets'' of a possibility of reverter, which he claimed in *jere coronæ*.

The citations from *Co. Lit.*, 260 a., and 6 *Rep.*, 55, are unquestionably law; but their application to this case is not perceived.

The object of *Mr. Harper*, in 7 *Cranch*, is to show, that a state may be estopped as an individual: a position which is admitted as to the basis of this argument. It is only, however, the argument of counsel, and is entitled to no weight.

Upon the whole, then, it appears, that a feoffment bars by force of the livery; and deeds without livery create no bar of themselves, but only by force of the warranty annexed to them.

The grant issued by *King George* under which the plaintiff claims, is not a feoffment. It contains no warranty express, and none is implied. If, therefore, it concerned only a citizen, he could not be estopped; and from this it may be concluded, without presumption, that the state is not estopped.

2. The parallel of latitude is the boundary of *Granville's* tract. It would be absurd to suppose the extent of this large domain was intended to rest upon the position of a stake, or the house of *Thomas Wallis*. It is clear the latitude was the boundary designed. The beginning is a stake in that latitude. A stake is an imaginary point, and this Court have determined it is so to be considered. The call from the beginning is west, and of course is in the same parallel continued. Then the observations taken by *Mr. Mushat* were competent evidence to show where that boundary was. For how else is a parallel of latitude to be ascertained? If competent, its weight was for the jury, and not for the Judge to consider.

The reputation for forty years, and the surveys of the commissioners, were competent evidence. What (124) are the objections? The foundation of this general reputation, it is said, does not appear. The very reason for admitting reputation as evidence of boundary is, that from the nature of the fact, direct proof where the line was cannot be procured. The objection would exclude reputation as evidence altogether. For if the evidence which induced that general belief or reputation be pro-

duced, we do not want the reputation; if not produced, then the reputation is not admissible.

Two objections are urged to the competency of the surveys. 1. That the evidence on which the commissioners acted half a century ago does not appear. This is the same objection with that offered to the reputation, and is already, I think, obviated. 2. That the survey was not taken to ascertain the boundary of the tract of land now in controversy, but the boundary of adjoining counties. The answer is plain. The boundary of the counties is *Granville's* line; the survey ascertains where that line was supposed to be shortly after the deed to *Granville*. The boundary of this tract depends on *Granville's* line; and the survey being made for public purposes, without reference to any individual contest, strengthens its force as evidence, for it excludes the idea of partiality or prejudice.

That surveys taken on public occasions are evidence to ascertain the rights of individuals not named in them, will be seen by reference to *Peake's Evidence*, ch. 2, s. 2. (*Et vide Hob.*, 188; *Gilb. L. E.*, 78; 1 *Burr.*, 146, and other cases cited in *Peake*.)

But if the reputation of half a century, the surveys and the observations taken by *Mr. Mushat*, are not evidence, how is the line to be proved? The last proof is objected to for its uncertainty; and what substitute is offered us in lieu of it? We are told to begin on the sea shore at the stake, or at *Wallis's* house, and run a line west by the chain and compass, a line more than three hundred miles in length. Where does the preference lie upon the score of certainty?

HENDERSON, Judge.—In running a long line upon (125) a parallel of latitude, the only mode of correcting the variation from the true line, is to resort, from time to time, to observations.

Badger.—Without that, a departure, very trifling at the beginning, would amount to a deviation of many miles before the whole line was run.

But there is another conclusive answer to the objections now urged to the admissibility of the evidence. All the evidence was received in the Court below, without objection taken by the plaintiff's counsel. The Judge below

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was not bound to reject evidence offered by one party and not opposed by the other. Being offered, its weight was properly left to the jury. The Judge could not give them an opinion what weight it was entitled to. If he could, he was not bound to do it. If bound to give such opinion, he was bound only when desired by the counsel; and he was not desired to do so.

The counsel for the plaintiff below allows the proof to be received; never intimates an objection; it is summed up and left with the jury, and no particular instructions asked; but when the verdict is found against his client, he then brings forward, for the first time, his objections to the evidence, and complains because the Judge did not intrude himself into the jury box and give an opinion upon the weight of the evidence.

The objection and the complaint certainly comes too late, if they could have availed at any time. The duty of objecting to evidence belongs to the counsel, and cannot be transferred to the Judge. To decide upon the objections when made is his province. Where the counsel is silent, the Judge cannot err in receiving evidence, for such silence is a waiver of every objection.

HALL, Judge.—I can see no objection to the charge given by the Judge to the jury in this case. The question of fact was, whether the lands in dispute lay within (126) the boundaries of the lands granted by the King to *Earl Granville*; nor can I see any legal objection to the evidence offered to the jury relative to that fact.

I would also think the question of law arising in the case, free from doubt, if we take as true what the jury have found by their verdict, that is, that the land in dispute lies within the limits of *Earl Granville's* grant from the crown.

The plaintiff also claims title under a grant from the crown in the year 1768, subsequent to the date of *Earl Granville's* grant. As the King had conveyed title to the lands in dispute to *Earl Granville*, it follows, that at the time of the grant to the plaintiff's father, he had no title to the lands, and of course could convey none. "For if he enters without title, or seizes land by a void or insufficient office, he is no disseisor; but if the King by letters patent grants land so seized, and the patentee enters, he is a dis-

seisor, because he has time to inquire into the legality, which it is supposed the King has no leisure for." (*Gwilliam's Bac. Ab. "Prerogative" F.*, 3.) Therefore, as the plaintiff's pretensions to recover in this action rest solely upon the grant from the crown, he must fail; nor do I think his claim is in any respect bettered by the revolution in government which took place afterwards, when the state succeeded to the rights of the crown as well as to those of *Earl Granville*; because if, at that time, *Earl Granville* had not disposed of the lands, they still belonged to him, and consequently, title to them vested in the state, and that title was not in any respect affected by any rights derived from the crown, because whatever right it once had to the lands, it had conveyed those rights to *Earl Granville*. For these reasons I think the rule for a new trial must be discharged.

HENDERSON, Judge.—It is contended by the counsel for the defendant, that were it true that the sovereign power, like an individual, could be estopped; yet where the (127) conveyance is by grant without warranty express or implied, as in the present case, there can be no estoppel; and he refers the estoppel arising from bargains and sales, and other conveyances deriving their efficacy from the statute of uses, entirely to the express warranties which are attached thereto; and in feoffments, to the implied warranty arising thereon before the statute of *quia emptores*, from the services due from the feoffee and his heirs to the feoffor and his heirs; and since the statute, to the warranty implied during the life of the feoffee, probably from the nature of the conveyance, or from an adherence to the rule after the reason of it had ceased, a thing not very uncommon in our law; as we still retain many rules growing out of the doctrine of feuds, although feuds have long since ceased among us. I think that the counsel is wrong in attributing the estoppel to the warranty. The estoppel arises entirely out of the affirmations of matters of fact made in the deed. He has confounded estoppels and rebutters; things essentially different in their nature, although frequently producing the same results. A rebutter operates on *the right of action to the estate*. It operates as to strangers, as well as between parties and

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privies; which is a consequence flowing from its operation on the *right to the estate*. An estoppel operates entirely as to *facts*; its effect is to conclude the parties from making, and of course proving, the facts to be otherwise than they are stated or acknowledged to be in deed or other transaction out of which the estoppel arises. My collateral ancestor deprives me of my estate, and makes a feoffment in fee to a stranger with warranty and dies; the warranty descends on me as his heir (and this is done under such circumstances as that it does not amount to what is called a warranty commencing by disseisin). In any controversy which I may have with *any* one in regard to the lands, after the warranty has descended on me, this feoffment and warranty will bar my right of action to the estate.

If I had lost my right of entry when the warranty (128) descended on me, it is as effectual to bar or destroy my estate (and that with regard to the *whole* world) as if I myself had made a feoffment of it. But if I to-day should make a feoffment or bargain and sale of lands, which do not belong to me, to A, and to-morrow purchase the estate of B, to whom it belonged, although nothing in reality passed from me to A, I having nothing in the estate, could not transfer anything to him, for a person cannot grant that which he has not; yet in a controversy with B, I shall not be permitted, that is, I shall be estopped to aver and of course to prove that I had nothing when I granted to him, and set up in myself the title which I had afterwards acquired of B; for having affirmed in my conveyance to him that I had the estate, I shall not afterwards affirm that another had it. But this estoppel is confined entirely to *parties* and *privies*, it affects not a stranger; and as it affects not a stranger, neither will it affect me in a controversy with him; for the agreement between A and myself as to certain facts, does not make the facts in reality so. The agreement as to how they are, is only binding upon us and our privies; in our controversies with others, we are at liberty to show how they really are. In a controversy, therefore, between myself and a stranger, if the stranger, for the purpose of showing that A has title, and if A had I could not have it, shows my deed to him, it is competent for me to show that when

I granted to A, I had nothing in the land, and I will prevail against him on my title derived from B.

Farther, to show that estoppels operate as to the *facts* only, if A reciting that he had not an estate in the lands intended to be granted, but that another has, bargains and sells them to B; if A in reality had nothing in the lands, nothing passes, not even by estoppel, for there is affirmation against affirmation, and of course no estoppel can arise. To use the language of *Lord Coke*, there is estoppel against estoppel, and the matter is left at large. So if one (129) has an interest, although not as large as the estate granted, as if lessee for life or years, bargains and sells in fee, the affirmation of title shall be confined to the estate for life or years, and no estoppel arises; as if A is tenant for the life of B, and A bargains and sells the lands to C and his heirs, and A afterwards purchases the reversion from the owner and then B dies, A may recover the lands from C, notwithstanding his deed to C and his heirs; that is, the affirmation of title is confined to this, that A had an estate during the life of B. Cases might be multiplied to show the difference between a rebutter arising from a warranty, and an estoppel. We may add also, which would seem of itself conclusive, that estoppels arise in cases where there can be no warranty; acts *in pais*, acts in the country. Nor is the reason more sound, that estoppels arise only from such conveyances as operate by way of transmutation of possession, as a feoffment, and not on those which operate under the statute of uses; for as to their affirmation, and of course their estoppels, they are precisely alike. A feoffment, accompanied by livery of seisin, passes the estate, there is an actual tradition; the estate passes as to all the world, and any person may show it, because the *fact* is so. But in a bargain and sale, there is no actual tradition; the statute only transfers the seisin which the bargainor has; if he has none, none in *reality* is passed, and strangers cannot be affected by a thing which never happened; but as between the parties the seisin shall be considered as passing, because the bargainor is estopped from showing that he was not seised, and if he was seised the statute transferred it. As between the parties, the bargain and sale shall pass what it purports to pass; as to strangers, what it actually does pass. Thus

a feoffment in fee by a tenant for life is a forfeiture, because, as to all the world, it passes the fee; it displaces the estate of the reversioner, it is therefore an injury to him which is punished by a forfeiture of the life estate. But if tenant for life bargains and sells the lands in fee, it (130) is no forfeiture; for as to all but the parties to the bargain and sale (in which term I include privies), it passes only the life estate, for that was the extent of the bargainor's seisin; and passing only the life estate, it did not displace the reversion; it was, therefore, no injury to the reversioner, and, therefore, no cause of forfeiture. Nor do the authorities cited from *Cruise* and *Sheppard* support the position contended for. They were cases of releases, operating by way of *mitter le droit*, or extinguishment. In them no *estate* passed by the release, but only a right, say a right of action. Rights are not the subject of transfers or conveyance, but estates are. A right to an estate is not demanded in an action, but the estate itself. *Rights* may be *released* or extinguished, but not *granted*. If A is out of possession, and assigns or transfers to B who has no estate in the lands, B can sustain no action for the lands, as well for the reason that the subject matter was not the object of a grant, as from the rule said to be founded on policy, that no man can sell his right of going to law. If A releases to B all his right in certain lands, B having no estate in the lands, nothing passes, not even by estoppel, for that cannot pass by estoppel which in *reality* cannot pass by a conveyance. In the cases cited, the releasor, by his release, affirmed that he had *a right* to the lands, and no estate therein; for a release presupposes the *right* to be in the releasor, and the estate in the releasee (I mean as to releases operating by way of *mitter le droit* or relinquishment), and the release can support no action on such *acquisition*; it only confirms and strengthens the estate which he had before. If A, therefore, releases his right to B in a certain estate which B has in possession, and A afterwards acquires a good estate in the lands, he may set it up, for it is a different thing from that which he affirmed he had in his release; and estoppels being odious, the party shall not be concluded from showing the truth, unless the affirmation be directly upon the point, not to be arrived at by argument and conclusion.

(131) And this distinction between an estate and a right is almost daily acted on. In our actions on covenants for title and quiet enjoyment, if the right and estate were the same thing, no breach could ever with propriety be assigned for breaches of covenants for quiet enjoyment contained in an indenture of bargain and sale; for in such cases the bargainee is as much estopped as the bargainor; but it is as to the *estate* in which they are estopped. The breach is not that no estate passed, but that an *estate did pass*, but that the title to that estate was not good, and that he was disturbed in the *enjoyment of that estate* by one having title. In fact, the very idea of annexing a warranty or covenant presupposes an estate to pass; for without the estate passes there can be no warranty, which is a dependant covenant, as is a covenant for quiet enjoyment, although by the phraseology there may be an independent covenant, but it is not attached in law to the estate. This very clearly proves what is affirmed, and what estoppels arise out of a bargain and sale.

With respect to the case cited by the counsel for the plaintiff from *Co. Lit.* where *Edward the 4th* was barred, that was clearly the case of a rebutter arising from a warranty made by his collateral ancestor the *Duke of Cornwall*, which descended on *Edward the 4th*. As to the case from Massachusetts, the operation of the resolve of the legislature was not so much to declare where certain falls in the river were, as to locate a prior grant; it operated to locate the lands, where the legislature said the falls were; it operated as a new grant, which the legislature certainly had the power then to make; it confirmed the old grant, and fixed it at certain falls; and if such was not its operation, the decision was wrong, for a sovereign cannot be estopped. But the sovereign power conveys neither by feoffment, bargain and sale, or any conveyance dependent on livery of seisin or transferring uses into possession. By

grant, the sovereign will alone passes the property, (132) evidenced by matter of record; and all grants from the sovereign are matter of record, and when under the great seal of the state prove themselves. And I know of no case where the sovereign power has been estopped; the cases are all the other way, and policy and justice require that they should be so. This sovereign, or sovereign

power, is a trustee for the people; it acts by agents; the people should not be bound by any statement of facts made by those agents. For their benefit, the truth may always be shown, notwithstanding any former statement to the contrary. Where the state, therefore, succeeded to the rights of the King, and to those of *Lord Granville*, it was competent for the state to show, that the King's grant to the plaintiff in the year 1768 passed nothing, the King having granted the same lands to *Lord Granville* in the year 1744; for the King, or sovereign power, cannot, any more than an individual, grant that which he has not. The lands in question were the property of the state, I think, certainly succeeded to *Lord Granville's* lands, by the most complete confiscation, by taking the very property to itself, as it did by the entry laws, and passed them to the defendant by its grant in 180—.

As to the evidence which was received to establish the line of *Lord Granville*, I can see no objection to it. Common reputation is certainly admissible in questions of boundary; and it was applied to this case much more consistently with the spirit of the rule, and the reasons on which it was founded, than when we permit a witness to swear that a person since dead told him that a certain tree in a remote wood was a line or a corner tree of some other person's land; and as to the observations made by *Mr. Mushat*, fixing the latitude, although such observations may not lead to absolute certainty, yet it is the best method which we have to ascertain the fact, and certainly better than by going down to the sea shore and running out west; for the latitude can as well be taken here, or (133) in Lincoln, as there. It would be impossible to continue the same course such a distance by the compass alone. Astronomical observations must, therefore, be frequently made to keep the course correct; for I do not agree with the plaintiff's counsel, but adopt the argument of the counsel for the defendant, that the cedar stake or the houses by which the line is said in the charter to run, are nothing else than marks pointing to the line, which, notwithstanding those *indicia* given in the charter, is on the parallel of latitude 35, 34 north. The rule for a new trial should be discharged.

By the Court,

Judgment affirmed.

M'CLURE'S EXECUTORS v. MILLER.

Approved, as to first point. *Hartoog v. Hubbard*, 19 N. C., 241; *Huffman v. Walker*, 83 N. C., 411. *Approved* as to second point. *Candler v. Lunsford*, 20 N. C., 407; *Wallace v. Maxwell*, 32 N. C., 110; *Tolston v. Mainor*, 85 N. C., 235; *St. v. Williams*, 94 N. C., 891; *Southerland v. Stout*, 68 N. C., 496; *Bell v. Adams*, 81 N. C., 118.

M'CLURE'S EXECUTORS v. MILLER.

From Rutherford.

An action by a father for the seduction of his daughter, abates by the death of the father, and cannot be revived by his executors.

This was an action on the case, brought by *Arthur M'Clure* against the defendant for the seduction of his daughter.

After the cause was at issue, *Arthur M'Clure* died, his death was suggested on the record, and his executors were made parties; and at the last term, when the cause was reached in order, NASH, Judge, who presided, upon motion of defendant's counsel to dismiss, held, that by the death of *Arthur M'Clure* the suit had abated, and gave judgment accordingly; whereupon the executors appealed.

Carson, for appellants.—The question is, whether an action for loss of the services of a servant abates by the death of either party. There is no difference in (134) principle between this action and any other for the loss of service. In the case of *Bennet v. Allcot* (2 Term R., 168), Justice Buller says, that it is perfectly settled since the case of *Postlethwaite v. Parks* (3 Burr., 1878), that the action will not lie by the father, unless the daughter be proved in some way or other his servant; slight services will do, milking cows, &c. In the case of *Edmondson v. Machell* (2 Term R., 4), the seduction happened while the daughter was on a visit to her mother, yet being the servant of her aunt, the action was brought in the aunt's name.

Paley, in his Moral Philosophy, says, the injury is threefold, to the woman, to her family, and to the public,

but that, by the English law, no redress is given except to the family for loss of service.

In considering whether this is one of that class of cases which may be revived under the statute, the Court would not be influenced by any circumstances going to show it to be one of more or less aggravation, it has nothing to do with it. The first act which is here material, is that of 1797 (*New Rev. ch.*, 532). No action of detinue or trover, or action of trespass where property either real or personal is in contest, and such action of trespass is not merely vindictive, shall in any cause or court abate by the death of either party. This is amended by the act of 1805 (*New Rev. ch.*, 679). Whereas doubts are entertained whether, by the above recited act, actions for injury done to real or personal property can be revived, where the property itself shall not be in dispute; be it enacted, that no action of trespass *vi et armis*, or on the case to recover damages done to property either real or personal, shall abate by the death of either plaintiff or defendant. And it would seem clear that withholding or destroying the services of one's servant, is an injury to personal property within the meaning of this act.

We have no other property in our slaves, but their services; and an action for the loss of those services, has been held to be within the words of the act in the case of (135) *M'Allister's administrator v. Spiller's executor*. (*Conf. R.*, 91.)

If it should be said, that this is an action given to the parent to repair his wounded sensibility, and that the legislature meant to exclude it when they named trover, detinue, &c.; it may be answered, that this would be giving to the act, which requires a liberal construction, a very limited one. The words in the body of the act embrace this case unequivocally, and go farther than the preamble; *all injuries done to property either real or personal*. The services of a servant are doubtless property personal, and their loss is an injury: the words *real* and *personal*, as here applied to property, are used in their strict legal sense, and intended to embrace every species of property, to the enjoyment of which one may be entitled, and in being deprived of which he may be injured. The preamble of the act cannot, on any admitted rule of construction, control

the plain declarations of the enactment clause. If the words, *real* and *personal*, be omitted, the act would read thus, all injuries to property, &c., and then there could be no doubt, because services are property.

The failure of actions by the death of parties was viewed as a mischief, and the legislature has manifested its solicitude to cure the evil; the construction ought, therefore, to aid, and not thwart their views.

The stat. 4, *Ed.* 3, made for a like purpose with our own, has always been liberally construed. *Wheatly v. Lane* (1 *Saund.*, 216, *note*).

As to the construction to be put on our statutes, see farther, *Brown v. Blick* (7 N. C., 511).

Wilson, *contra*, insisted that this was such an action as the legislature meant to include under the phrase *vindictive*, and consequently could not be revived.

TAYLOR, Chief Justice. — This case depends upon the construction of the act of 1805, *ch.*, 679; the words (136) of which, so far as they relate to this case, are,

“that no action on the case for damage done to personal property, shall abate by the death of either plaintiff or defendant.”

This is an action on the case, brought by a father for the seduction of his daughter, and the question is, has it abated by his death? Considering the nature of the action, and the extent of injury and suffering which usually follow the crime of seduction, I should be gratified to discover a satisfactory ground for the opinion that the action might be revived. I think the plaintiff's counsel has presented the case in the strongest point of view it admits of; yet after all it must be admitted, that the action is but in form and sound for an injury done to property, but is in substance for a wrong done to the person of the child, and to obtain satisfaction for the wounded feelings of the parent. The loss of service is in most cases imaginary; for though some evidence must be given of acts of service to satisfy the form, yet in the estimate of damages the jury usually look beyond this to the injury done the child. The *pro-bata* are much more extensive than the *allegata*, and damages may be given as a compensation for the loss which the father has sustained, in being deprived of the society

and comfort of his child, and for the dishonor which he receives. Hence evidence is admissible, as to the circumstances of the father's family, their general good conduct, and the number of his children. Actions of this sort are brought for example sake; and although the plaintiff's loss may not amount to twenty shillings, the jury do right in giving liberal damages. (3 *Wills.*, 19.)

It is said, in the case of *Bedford v. M'Kowl*, that, "in point of form, the action only purports to give a recompence for loss of service; but we cannot shut our eyes to the fact, that this is an action brought by a parent for an injury to his child; in such a case I am of opinion, the jury may take into their consideration all that he can feel from the nature of the loss. They may look upon (137) him as a parent losing the comfort as well as service of his daughter, in whose virtue he can feel no consolation, and as the parent of other children whose morals may be corrupted by her example." (3 *Esp. R.*, 119.)

As the child herself has no remedy, and the offence is only indictable under peculiar circumstances, it would pass with impunity, were not these forced circumstances employed to give the Courts cognizance. It is characterized by a sensible writer as one of the quaintest fictions in the world, that satisfaction can only be come at by the father's bringing the action against the seducer, for the loss of his daughter's service, during her pregnancy and nurturing. (*Paley, Mor. Phil.*, 200.)

From these considerations, it appears to me that this action must be considered as a tort done to the person, unaccompanied by any injury to personal property, and it is accordingly so classed by writers on pleadings (2 *Chitty*, 268), it is therefore abated by the plaintiff's death.

HALL, Judge.—The sole question here is, whether this action survives to the plaintiffs, or abates by the death of their intestate. There is no doubt but it abated at common law. By the act of 1799, *New Rev. ch.*, 532, it is declared that no action of detinue, or trover, or action of trespass, where property either real or personal is in contest, and such action of trespass is not merely vindictive, shall abate, &c., by the death of either party, but the same may be revived, &c. The present action is one in form

brought to recover damages for the loss of the services of the daughter; but it is in substance brought to recover damages for the disgrace and degradation of which the defendant is the author. In this view of it, which I think we must unavoidably take, it does not involve in it a contest respecting either real or personal property; and I think, too, that the damages are, legally speaking, vindictive, for they cannot be measured by any injury which *property* may have sustained, but are dependent altogether, under (138) the circumstances of the case, upon a sound discretion, intended to make reparation to the injured party as far as human tribunals *can* do it, for complete reparation in such cases is beyond their reach.

The next and only other act on the subject was passed in the year 1805, *New Rev. ch.*, 679. It declares that no action of trespass *vi et armis*, or trespass on the case, &c., brought to recover damages done to property, either real or personal, shall abate by the death of either plaintiff or defendant, &c., but the same may be revived. If we consider this action in substance as brought to recover vindictive damages, as mentioned in the act of 1799, it is not made to survive by this latter act, for it is not brought for an injury done to either real or personal property. I, therefore, think it will not survive, but abates by the death of the plaintiff. The judgment of the Superior Court must be affirmed.

Judge HENDERSON assented,

Judgment affirmed.

There is one part of the foregoing case on which no question was made, but which does not seem entirely free from doubt. The action brought was *case*, notwithstanding some of the most respectable authorities hold *trespass* to be the proper form of action. In the case of *Woodward v. Walton* (2 *New Rep.* 476), the action was *trespass*, and upon full argument, and after an *advisari*, it was held to be proper. Sir James Mansfield remarks, in delivering the opinion of the Court, "in actions like the present, as far as my recollection goes, the form of the declaration has always been in *trespass vi et armis* and *contra pacem*. I cannot distinguish between this action and an action for criminal conversation. If that be the subject of *trespass*, this must be so too." It is true, that Mr. Justice Buller, in *Bennet v. Allcot* (2 *Term. Rep.* 166), said, that "an action merely for debauching a man's daughter, by which he loses her service, is an action on the case." This case is commented on by Sir J. Mansfield, in *Woodward v. Walton*; and it is there said, that the opinion thrown out by Justice Buller was founded on a mistake respecting two other cases, one in *Burrow* and the other in *Lord Raymond*. The case in *Burrow* was *Postlethwait v. Parks* (3 *Burr*, 1878), and was *trespass*; and the case of *Russel v.*

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Corne (2 *Ld. Raym.* 1031), is certainly rather in favor of *trespass* than against it. The case of *Tullidge v. Wade* (3 *Wills*, 13), was *trespass*. However, in the case of *Macfadzen v. Olivant* (6 *East* 387), Lord *Ellenborough* seemed to consider *case* as the proper remedy for seducing (139) plaintiff's wife, on the authority of *Cook v. Sayer* (2 *Burr*, 753), but the case of *Cook v. Sayer* is stated by *Burrow* to have been *trespass*; and in *Batchelor v. Biggs* (2 *Bl. Rep.* 854), it is said to have been *trespass*. In a late case before the Court of King's Bench for seducing a daughter, *Speight v. Oliveira* (2 *Starkie* 493), decided in 1819, it was objected that the action should be *trespass* and not *case*, to which *Abbot*, C. J. replied, that he would not nonsuit upon that objection.

Amid these contradictory decisions, adverting to principle, it would seem that *case*, and not *trespass*, is the proper remedy. The injury which the law contemplates as entitled to redress, is *consequential*, for it is believed no case can be found of an action brought for debauching plaintiff's daughter without laying a *per quod*, and some proof of service is always required, though the Courts will gladly take notice of the slightest. Simply to debauch plaintiff's daughter, without her becoming thereby pregnant, is to the feelings of the parent, a wound little, if any, less severe than that inflicted by her becoming the mother of an illegitimate child; but as this action in its forms has been well characterized as a quaint fiction to recover compensation for wounded sensibility, the fiction must be so preserved throughout that the law may preserve its principles unimpaired; and as the consequential injury in the loss of service has been resorted to, to furnish any ground for an action that consequential injury, like every other, can only be redressed by an action on the *case*.

It is true that Sir *J. Mansfield* has said, "I cannot distinguish between this action, and an action for criminal conversation;" but (with deference be it spoken) it would seem that however slight the difference may be as to the feelings of those who are injured, in the view of the jurist, the injuries belong to distinct classes. Lord *Ellenborough*, in the case of *Macfadzen v. Olivant* (6 *East*, 388), thus speaks of actions for crim. con.: "the cause of action in these cases, arises from the time of the injury done by the defendant, by the corruption of the body and mind of the wife; for from that time she is less qualified to perform the duties of the marriage state." The injury which the law redresses would seem then, in these cases, to be *immediate* on the commission of the guilty act; and of course *trespass* is proper. A single act of adultery, though never manifested in its consequences, is an invasion of the husband's rights, and the law redresses it; but in actions for the seduction of a daughter, the 'quaint fiction' of a *loss of service* seems, *ab initio*, to have been resorted to as the consequential injury which the law will compensate, without any reference to "the corruption of body and mind," which is the immediate injury complained of in an action for crim. con.

It is very correctly remarked by the plaintiff's counsel, in the argument of the foregoing case, that there is no difference in principle (140) between this action, and any other for the loss of service; they must all stand on the same ground. Suppose the case of an apprentice seduced from the service of his master by persuasion; can a case be found in which, under such circumstances, *trespass* will lie? No force, direct or immediate, is employed; the mere act of conversing with the apprentice is not of *itself* the foundation of an action, for should the servant not be prevailed on to leave his master, no injury results and no action lies; but if, being a free agent, he departs, it is his *voluntary* act, and his master cannot truly allege that his servant, by any force (in legal signification), has been taken away. His departure, and the master's loss of service, is the *consequence* of an act which in itself would not have supported an action, and the master's remedy is *case*. So in the case of the

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loss of service by seducing the daughter, *her consent* must have been given, and it was her *voluntary* act, and her father, in the forms of his suit, loses the character of a *parent* and appears only as a *master*, complaining of an injury resulting as a consequence from this act of her's which must have been voluntarily done, though at the solicitation of another.

If to this it be objected that in a case of crim. con. the wife, who is a servant, *consents*, and yet her husband may have *trespass*; it may be answered that the case is one *sui generis*: the husband has, so to speak, a property in the body, a right to the personal enjoyment of his wife; for an invasion of this right, the law permits him to sue as *husband*; he makes no complaint as *master*. Far different is the case of seduction of a daughter; her father has no such rights over her person as he has over the person of his wife; he makes no complaint but in the character of *master*, and the injury sustained by debauching his wife, is such as never could be effected by the seduction of his daughter.

(141)

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From Orange.

A executed a paper writing in the form of a deed of trust, and afterwards on the same day made his will referring to the former paper, the purpose of which was a distribution of his estate after death. D Y was one of the trustees named in the deed, and also one of the executors named in the will, and one of the only two subscribing witnesses to both papers. The trustees were directed by the first instrument to retain out of the funds a compensation for their trouble. The testator had both real and personal property, which his trustees and executors were directed to sell. After the death of A, D Y released all his claim to the other trustees.

Whether the two papers are to be considered as one testamentary disposition. *Quere?*

The will is not well executed. D Y had such an interest in the lands devised as was contemplated by the act of 1784, and when such interest exists at the time of attestation, no subsequent release will avail.

John Allison, on the first day of May, 1821, executed a paper writing in the presence of *David Yarbrough* and *William Horton*, subscribing witnesses thereto, with the solemnities required by law in a will to pass real estate; this writing was the following words, viz.:

"Know all men by these presents, that on the first day of May, in the year of our Lord one thousand eight hundred and twenty-one, I, *John Allison*, of the town of Hillsborough, county of Orange, and state of North-Carolina, of the one part, *Frederick Nash*, *Abner B. Bruce* and *David Yarbrough*, of the town, county and state aforesaid, and *William Shaw*, of the county of Wake and city of Raleigh, of the other part, witnesseth, that for and in

consideration of the natural love and affection which he the said *John Allison*, hath and beareth to his friends and relations in North Britain, in the shire of Renfrue, and to the intent to make some provision for their maintenance and advancement in the world, and for settling and assuring the premises hereinafter mentioned, and for (142) other good causes and considerations me hereunto moving, I, the said *John Allison*, from a full confidence I have in the honor, honesty and integrity of them the said *Frederick Nash*, *Abner B. Bruce*, *David Yarbrough* and *William Shaw* as aforesaid, and for the consideration of the sum of five shillings to me in hand paid by them the said *Frederick Nash*, *Abner B. Bruce*, *David Yarbrough* and *William Shaw* as aforesaid; that is to say in trust the following property, to wit: my corner house now occupied by *John Van Hook & Co.*, also my new house lately occupied by *William Huntington & Co.*, both being on part of lot No. 6, in the town of Hillsborough, be sold, separate or together as may best suit the purchaser and enhance the price; also all my stock I now have and possess in the State Bank of North-Carolina at Raleigh, that is to say, if I do not sell said stock before my decease, consisting of twenty shares, amounting to two thousand dollars, together with all the profits or emoluments that may be due thereon; I, the said *John Allison*, do hereby assign over and convey to them, my trustees, for the following purposes hereinafter mentioned, to wit: that immediately after my decease, or as soon after as may be found convenient, I, the said *John Allison*, do hereby authorize my trustees aforesaid to sell my bank stock as aforesaid for the best price that can be got for it, and convey or transfer the same to the purchaser or purchasers thereof and to their heirs and assigns forever, and to do and transact all matters and things touching and concerning the premises agreeably to the laws and regulations that now are, or may hereafter be established or required by the directors of said bank touching and concerning the premises, in trust and confidence that immediately after my decease, or as soon afterwards as may be found convenient, they the said trustees aforesaid are hereby required, empowered and authorized to sell the corner house now occupied by *John Van Hook & Co.*, also my new house lately occupied

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by *William Huntington & Co.* with the appendages (143) thereunto belonging, described as aforesaid, for the best price that may be got for them, and to convey to the purchaser or purchasers thereof, their heirs and assigns forever, as fully to all intents and purposes as I myself might or could do were I living; provided always, that as soon as the money is received arising from the sale of my stock I have in the State Bank, so soon as the money shall be collected, shall be remitted by bills of exchange or otherwise, as my trustees may deem proper for the safe conveyance, and the bills to be drawn in favor of and made payable to *James Craig*, Junior, manufacturer, in the town of Paisley, shire of Renfrue, North Britain; and farther, my trustees are hereby required and directed that out of the monies arising from the sale of my houses and lots as aforesaid, two hundred and fifty dollars be paid to my nephew, *James Allison*, and one hundred dollars to *Abner B. Bruce*, for the purposes mentioned in my will; and fifty dollars to *Mary Allison*, mother of *James Allison*, of the state of Delaware (if living at my death); and my said trustees are hereby directed that all the debts due to the said *John Allison* at his decease, either by note, bond, house rent, money on hand or otherwise, they, my said trustees, are hereby empowered to collect, sue for, and receive the same into their own hands, and also be placed with the money arising from the sale of my lots and houses and bank stock, and the balance of what may remain in their hands, after what I have hereby enjoined on them to perform, I do hereby require and direct to be remitted to the said *James Craig*, Junior, manufacturer, in the town of Paisley, North Britain, shire of Renfrue; and the said trustees are hereby authorized and directed to retain to their own use out of the monies that may come to their hands, a sufficient compensation for their trouble in performing and executing the trust hereby reposed in them, and also for discharging any debt that may arise from a sick or death bed, and physician's aid if required, and funeral charges, &c. And I do hereby request of (144) my trustees, that nothing but a plain and decent interment, no funeral service shall be performed at my interment, but what a Gospel Minister or private christian may think fit and appropriate for such a solemn

occasion. And this deed of trust shall not affect my last will and testament in favor of my nephew *James Allison*.

I hereby request *Mr. William Shaw*, of Raleigh, who I have appointed one of my trustees, that immediately after my decease, or as soon after as he may find it convenient, to write to *Mr. James Craig*, acquainting him of my decease; and I do direct that neither my stock, nor my houses and lots in Hillsborough shall be sold until an answer be received from him. And in case of the death, inability or removal of any of the trustees hereby nominated and appointed by me to act in this behalf, then and in that case, the surviving and acting trustees are hereby required and directed to choose another or others in their stead; and shall have full power from time to time to act accordingly as the case may require. And it is hereby required by him, the said *John Allison*, that this deed of trust be put on record as soon as practicable after my decease. In testimony whereof, I, the said *John Allison*, do hereunto set my hand and affix my seal, the day and year first above written."

Afterwards, on the same day, *John Allison* executed another paper writing in the presence of the same subscribing witnesses, with the solemnities required by law in a will to pass real estate, and in it referred to the former writing; this last writing was in these words:

"In the name of God! Amen. I, *John Allison*, of the town of Hillsborough, county of Orange, and state of North-Carolina, being well advanced in years and very infirm, but of sound disposing mind and memory, and calling to mind the mortality of my body, do make, ordain and publish this my last will and testament in manner and form

following, to wit, after all my just debts and funeral (145) charges are paid by my trustees appointed for that and other purposes, I give, devise and bequeath to my nephew *James Allison* all the personal property I may be possessed of at the time of my death not otherwise disposed of, in addition to the sum of two hundred and fifty dollars to be paid to him by my trustees, to him, his heirs and assigns forever, except my stock in the State Bank at Raleigh, consisting of two thousand dollars, and the dividends that are or may become due thereon, also excepting my house rents and debts of every description which I

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have made over to certain trustees for other purposes, which will more fully appear by reference to the deed of trust bearing even date herewith, and excepting also my negro woman slave named Ann, which for divers causes and considerations me hereunto moving and meritorious services rendered to me by her in time of sickness, I do hereby will, devise and bequeath my said negro woman slave Ann to *Abner B. Bruce*, with this condition, that she be not sold or given away to any other person except it be with her consent; but that the said *Abner B. Bruce* support her with food and clothing suitable to her station; and I do hereby give, devise and bequeath to the said *Abner B. Bruce* the sum of one hundred dollars, which sum I hereby direct my said trustees to pay to him for the support of my said negro woman Ann when she may, through old age or infirmities, become unable to perform the duties of a slave and servant; and should my said negro woman die, or be dead before or after my decease, the said sum of one hundred dollars notwithstanding is to be paid to the said *Abner B. Bruce* as a legacy out of the real property I have made over to my trustees and directed to be paid to him by them.

All my just debts, if any be due and owing to any person or persons whatever after my decease, I hereby direct to be paid by my trustees nominated for that and other purposes, who are also authorized to collect all debts (146) due and owing to me, whether due by bond, note, account, or in any other manner on what account soever.

It is hereby declared to be understood, and my will and intention is, that my nephew *James Allison* shall have no claim, right or title whatever to any bonds, notes, debts, dues or accounts that may be due or owing to me on any account whatever at my decease. I, the said *John Allison*, do hereby nominate, constitute and appoint my friends *David Yarbrough* and *Thomas Clancy*, esquires, executors to this my last will and testament, hereby revoking, annulling and disallowing all former wills and bequests by me heretofore made, hereby allowing, ratifying and confirming this only to be my last will and testament. In testimony whereof, I, the said *John Allison*, do hereby pronounce, publish and declare, in the presence of God as my

witness, and by my well known signature written with my own hand and seal thereto affixed, this first day of May, in the year of our Lord one thousand eight hundred and twenty-one."

John Allison died without revoking or altering the foregoing writings, and they were offered for probate as containing one testamentary disposition of the estate of *John Allison*; prior to which, *David Yarbrough*, the subscribing witness, who is the same person mentioned by that name as a trustee in the paper writing first set forth, by deed, fully released to the other trustees all the interest which he had under the writings, and was admitted as a witness, though objected to.

The probate was opposed, and on an issue submitted to a jury, they found that the two papers above set forth were the last will and testament of *John Allison*, subject to the opinion of the Court upon the foregoing facts; and it was submitted to the Court to say, whether the two paper writings together constitute one testamentary disposition or will.

The Court (PAXTON, Judge) held, that the paper writing constituted one will, and rendered judgment accordingly, from which an appeal was taken to this Court.

Seawell, for the appellant.—The questions which (147) appear to present themselves in this case, are two.

First, whether the paper writing in the form of a deed be testamentary? Secondly, if it is testamentary, whether it was executed in such manner as to be sufficient to pass real estate under the act of 1784?

I shall examine the last point first; and this leads to the consideration of the admissibility of *Yarbrough*, the subscribing witness. I contend, that he was interested at the time of his attestation, and that this interest has not been removed by the release. The amount or quantum of interest to disqualify a witness, is of no importance; for it has been wisely said, the law can form no scale for the temptation of man. In the present case, the deed, as I call it, conveys to the trustees, of which the witness is one, the fee simple in the real estate, for they are directed to convey to the purchaser in fee. It grants all the bank stock, which they are directed to sell; and all the debts they are directed to collect; and out of the monies raised

from *all* these sources, they are directed to retain a just compensation for their trouble. It is the same, therefore, in effect, as if a certain portion of the real and personal estate had been conveyed to them. This interest passes with the estate, which may be greater or less according to future events. The fee simple passes in trust; the trust is to sell the estate upon the happening of a certain event; and then to retain out of the trust fund a compensation for services in performance of the trust. The quantum of compensation is to depend upon the quantum of service; the right to retain does not arise till the services are performed. The release as to this right of compensation cannot operate to extinguish the right, when made to the other trustees, because the claim to compensation is not *against* them, it is personal in its nature, and when performed is to be *retained* by the trustee; the trustee is to perform the service and pay himself. But this payment or retainer cannot be said to be adverse to the rights of the co-trustees; and (148) if it was adverse, as the right to retain was only to arise when the services were performed, the release could work no extinguishment until the event happened. It would therefore seem to me that a release to *John Doe*, or to the deceased bargainor, would have been just as effectual.

But, possibly, it may be contended, that the release is of all the *estate* which the witness took. Then I answer, they were tenants in common by our act of assembly, and that being tenants in common, the release cannot operate. Again, if the release *could* operate to convey the estate, yet until registered it remains inefficient. And it cannot pass as a bargain and sale, for the same reason; to which may be added another, that there is no consideration. In whatever light, therefore, this question is examined, it appears to me that the witness was more than a *naked* trustee; that he was interested at the time of his attestation, and that his interest has not been removed by this release. But whether the release does or does not extinguish the interest, I contend, that being interested when he subscribed his name in the presence of the testator (if the paper is to be considered as a will), that under our act of assembly, it is void as to the real estate. This act declares, that no will or testament shall be available to pass lands, &c., un-

less subscribed by two witnesses, no one of which shall be "interested" in the said devise. And if it were asked of a plain man whether a will would be available to pass lands, which was subscribed by two witnesses only, one of whom was the devisee, where the act of assembly had required that the witnesses should not be interested, he would be very apt to say, that the devisee was interested at the time he subscribed, and as the act declares that there shall be two witnesses, no one of which shall be interested in the devise, the question itself contains its own solution. And it certainly does, if we regard the enacting words used by the legislature, and their reasons as assigned for (149) using them. The preamble is, to protect persons "weak in body and mind, from the undue *influence* of those *about* them;" and who so likely to attempt this influence as the person intended to be benefited by the will written? And though in a strictly *legal* sense, a will being ambulatory conveys no interest, because it has no effect till the death of the testator, yet can the intention of the law makers be doubted for a single moment? They were pointing out a character, or description of persons, who were to be excluded from attesting the will; they are *described* as interested, because the devise purports to give an interest to them; and the character of *interest*, being confined by the legislature to the time of their subscribing in testator's presence, who must then be alive, shows what they meant by a witness interested in the devise, and is tantamount to *devisee*. Acts of the legislature are passed for laying down rules for the mass of mankind; they ought to be, and are construed liberally, and in the most popular sense. It would not have been necessary to have declared that the will should be proven by witnesses not interested at the time they gave their testimony; this was already provided for by the rules of all evidence; to suppose they were providing against evidence is to suppose they meant nothing. If, therefore, these words in the act and their motives as assigned, are to be regarded in ascertaining their design, it would seem impossible to doubt upon the question. And what are the historical facts in support of this intention? Some time previous to the year 1752, by two decisions in the Court of King's Bench, *Hilliard v. Jennings* (*Com. Rep.*, 90, 94), and also to be found in *Id.*

Raym. and *Carthew*; and *Anstey v. Dowsing* (2 *Str.*, 1253), it was solemnly determined under the stat. of frauds, which requires wills to be attested by three *credible* witnesses, that a devisee or legatee was not a *credible* witness; and in the latter case, it was held that the tender of the legacy did not remove the objection, and the Chief Justice, *Lee*, in delivering the judgment of the Court, (150) states, that "it was objected nothing vests till the death of the devisor; and, therefore, at the time of the attestation the witness had no interest; but the answer is, that he was then under a temptation to commit a fraud, and *that is what the parliament intended to guard against.*" And again, the same Judge adds, that "the true time for his credibility is the time of his attestation, otherwise a subsequent infamy which the testator knows nothing of would avoid the will." The whole Court, in both cases, determining the wills to be void. After the determination of these cases, the parliament, in the 25 *Geo.*, 2, about the year 1750, from "an alarm taken by the practitioners," as *Mr. Powell* calls it in his treatise on *Devises*, 121, when the true principles of the statute came to be thoroughly discussed, passed an act, by which the devise to the witness is declared to be void, and he rendered competent, to meet the case determined by *Ld. Holt*, in *Comyns*; and the payment or tender of the legacy, or release to the witness, is declared to render him competent, to meet the case determined by Lord Chief Justice *Lee*, in *Strange*; with another provision, as to creditors being witnesses, where the real estate was charged with their debts. By the peculiar phraseology of this last mentioned section, the act was held to extend only to those who were *immediately* interested, and not to embrace such as had a mere *consequential* interest; and afterwards two other cases, of equal celebrity, came before the Courts; the one before the Court of King's Bench, *Wyndham v. Chetwynd* (1 *Burr*, 414; 28 *Geo.*, 2), the other before Lord *Camden*, in the Common Pleas, *Hinsdon v. Kersey*. The case before Lord *Mansfield* was determined in 1757; the case before Lord *Camden* has not been reported, though an abstract of it is to be found in *Powell Den.*, 131, but as that contains no date, we are somewhat in the dark as to the precise time it was determined, though it seems to have been after the

case in *Burrow*; but it is sufficient to state, that the question was presented in both cases, whether a person, (151) on whom the will conferred a benefit, was *interested* by the devise and was a credible witness? These cases, both of them, of the deepest interest to landed property, and happening immediately before the revolution, and in which *Lord Mansfield* and *Lord Camden* maintained different sides of the question, the former that the credibility applied only where the witness came forward to testify; the latter that it meant competency, and related to his attestation; independently of the known preference felt by the American people for *Lord Camden*, can leave but little doubt on the mind, that when the act of 1784 was passed, the legislature of this state must have had in view this rule, laid down by *Lord Mansfield*, and intended to have conformed as near as possible to the opinion entertained by *Lord Camden*. Indeed, the determination of the King's Bench, in the case of *Wyndham v. Chetwynd*, may be admitted and supported as coming within the statute of *Geo.*; for that was a case where *creditors* whose debts were charged upon the real estate were the witnesses; and *Mr. Powell*, in his treatise upon *Devises*, 130, observes, that it does "not seem to want the aid of any particular arguments to support it, since, upon the general circumstances of the case, it falls within the latter provisions of the stat. of *Geo.* as to creditors being witnesses, whose debts are charged on lands or hereditaments." But the reasons upon which the opinion of the Court is grounded in the case of *Wyndham v. Chetwynd*, go a great way in supporting the opposition taken in this case. *Lord Mansfield* says (1 *Burr.*, 417), "the question does not depend upon the construction of any particular words of the statute. The statute is silent as to the *capacity* of the witnesses, it requires no *qualification*;" that the epithet *credible*, "is never used as synonymous to *competent*, when applied to testimony, it presupposes the evidence *given*; and that the statute, by not declaring *who are or are not* credible, leaves the question just as it was; and (152) that, therefore, according to general principles of law, the question will be, not as to his competency at the time of *knowing the fact* he came to testify, but only, whether he was competent at the time of his *exami-*

nation. How different is the act of 1784! The question of who are competent witnesses is not left upon general principles; there is a *positive* incapacity created, which, from the very nature of the thing, must be referable to the time of attestation. The will is declared to be unavailable, either in law or equity, to pass lands, unless subscribed in the presence of the testator by two witnesses at least, no one of which shall be interested in the devise of said lands. The *devise*, therefore, of the lands is void, unless the will was subscribed by two witnesses who had no interest in the *devise*. It is the *kind* of witness to be selected which the statute is aiming at, so as to prevent as far as possible the chance of bargaining; for under every circumstance which can attend a transaction, a witness always will appear in an awkward light, who renounces a benefit to become a witness; and the contrivance by which he can be indemnified is so easy, that, generally, he is to be considered as *hired* to give testimony, and though he *may* speak the truth, yet is he generally *suspected*. The act of 1784, therefore, not depending upon whether the witnesses be *credible*, nor whether they be competent upon general principles, but requiring that they should not *be interested* in the devise; I take it that, as one of the devisees is one of the two subscribing witnesses, the will is consequently informal, and void as to the real estate; and the condition of the devise is not altered by the release of the witness; for unless *executed* in the manner pointed out by the act, that is, *subscribed* by two witnesses, no one of which is interested in the same, it is void. And if I am correct in this view of this question, it puts an end to the case; but if mistaken, it then becomes necessary to examine the remaining point, and that is, whether this paper be testamentary. I will not disguise my own conviction, that, according to some *cases* and *dicta* in the books, this is by far the most difficult undertaking; whilst, on the other hand, if we are to examine it upon *principle*, nothing seems more attainable. The *character* which every act of an individual acquires, depends upon the *intention*; and though it may frequently happen, that by mistake, one thing is done for another; yet that which is mistakenly done, if the mistake can be made appear, is never in law attributed to the party as his legal act. And

hence it may be fairly admitted, that if a party *intend to make a will*, and by mistake executes it in the form of a deed, or *vice versa*, the *quo animo* shall characterize the act, and it shall be considered a will, or a deed, according to his intention. If this principle be correct, let this case be examined by it; and here, let it be asked, whether, at the time these two papers were executed, it was the intention of *Allison* to sign and execute two wills? or did he then contemplate that *both* these papers were to be ambulatory and imperfect until his death, and alike subject to his alteration and control? It will not do to say, that the instrument shall be a deed, or will, according to the *office* or purpose it is to perform; and that if it relates to managing his affairs after his death, it shall be a will; for that would prove too much; it would convert all estates upon trust, which were informal, into wills; it would convert those numerous cases of gifts by parents to children, after a reservation of a life estate, into wills; in fact, it would be the philosopher's stone, converting everything which *could* be done by will, into a will, where the thing was attempted, but unskilfully done by deed. The true inquiry, therefore, must ever be, what does it *appear* the party intended to do? to *bind* himself, or to make a *will revocable* at pleasure? The whole difficulty has arisen from a want of legal knowledge when these papers were executed. *Allison* was probably a foreigner, as it appears by the deed the principal objects of his bounty resided in Scotland; he was, no doubt, aware, from the decisions made in (154) this state, that a devise to aliens would be void; and not having the benefit of legal advice, it occurred to him to *deed away*, as it is commonly called, his real estate, debts and bank stock, in trust for his friends in Scotland; and to make his *will*, for the residue of his personal estate. His idea was, no doubt, that by this deed he could limit and control the estate embraced in it in any manner he thought proper; and as he seems, by the last clause, to require it to be put upon record after his death, the probability and fair inference is, that he retained the possession of it, and it is expressly declared in the deed that it is not to affect this last will and testament. From all which it seems to me evident, that he intended to make a *deed*, and *not* a will, at the time he executed it; wherefore, I should

conclude, that this *Court* must make it his will, if it is to have that character. Cases can be adduced where papers, in the form of indentures, have been considered wills, which no doubt, from the research of counsel on the other side, will be adverted to. I will notice some of them, and they appear quite distinguishable from the present case. A noted one is to be found in 2 *Vez. Jun.*, 204, *Huberg-ham v. Vincent*. That was where a testator made his will, and devised his real estate, with various limitations over, *subject* to such charges, provisoes and conditions as he should by any deed or instrument in writing, to be executed by him and attested by two or more credible witnesses, direct, limit or appoint, and to no other purpose." Afterwards the testator, by a writing every way in the form of a deed, and reciting his will, and that he had reserved a power to himself of farther disposing of his property, proceeded thus, "know ye, that by this my *deed poll*, I do direct and appoint that my trustees (naming them) shall immediately after my death, &c." Now it is evident that the testator here intended to engraft some after-made provision into this will, at the time it was made, which, when done, being in its nature testamentary, *only* to have effect after his death, might be considered (155) *quoad hoc*, as intending to incorporate this paper in his will. This case came on first before *Lord Thurlow*, and he sent the question to the Court of King's Bench, whether this last paper should unite with the will? and that Court, with *Lord Kenyon* at its head, determined unanimously that it could not, being a *deed*, and certified accordingly. (5 *Term R.*, 92.) It is true, however, that after *Lord Thurlow* left the Court of Chancery, and was succeeded by *Lord Loughborough*, the case again came on, when the new chancellor, after retracting and changing his opinion several times, called in *Mr. Buller*, who had decided upon it in the King's Bench, and *Mr. Justice Wilson*, and after an elaborate argument of council, they determined the latter paper to be testamentary. And it is also true, that it is said by the chancellor that the case was not full enough when sent to law, though *Mr. Buller*, who seemed somewhat puzzled to account for the decision without relying upon the reason furnished by the chancellor, and which is evidently without foundation, frankly

confesses that the cases "did not occur" to him. What does *Lord Kenyon* say upon this case? He says, that "the latter paper is a *deed*, and *not* a will; it was called a deed by the party himself; it is stamped, and has all the semblance of a deed. Then supposing this to be a deed, there is no case in which it was ever decided that a series of limitations, in part created in one conveyance, and part in another, can be consolidated." What does *Mr. Buller* say? He very properly remarks, "the only question is, whether the paper of the 6th of October be a deed, or part of a will? If the former, consider whether the will *had* or had *not* any effect at that time. The will was dated on the 5th, the deed on the 6th; the will could have no effect when it was made, nor could it till the death of devisor;" and *Grose* declared himself of the same opinion. To say the most of this case, here is the Court of King's Bench, the proper forum to determine the question, against the Chancellor and two Judges; and in the case presented to the King's Bench, all the facts attending the execution of deed poll are stated, and in the *questions* the papers are called "instruments," so as to leave the Court of Law fully at liberty to characterize them; and that the Court did so, cannot be doubted from *Lord Kenyon's* opinion. Another is *Hickson v. Wytham*, to be found stated in *Powell on Devises*, 13. That was in the form of an indenture with a consideration of 5*l.*; but the latter part of the paper changed its form, and several legacies are bequeathed, then executors are appointed, and lastly, it was signed, sealed and published, *and delivered as his last will*, in presence of two witnesses. Another case, stated in the same book, 14 *Green v. Proud*, which might seem to go a greater length, but which, when examined, is still determinable by the same rule, that of *intention*. There the paper was in the form of articles of agreement, and was delivered as the *act and deed*; but it appearing that *directions* had been given to make a *will*, and a person *sent for to that end*, it was held to be a good will. But the case before the Court cannot be considered a will or a testamentary paper, in its design, without involving the grossest absurdity. For if it was intended by the testator, why not incorporate it into the will which he then professedly made? He seems to have been well apprised

of the two conveyances. In his will he mentions his trust deed, and in the deed he mentions his will; both of which are referred to as of the same date. To suppose, then, that when he, in substance, declares that he will not dispose of his real estate by will, but by deed, and executes at the same time two papers, the one a will, which he calls so, and the other a deed, which he calls a deed, and that he nevertheless intended two wills, is at once to suppose him too great a fool to be capable of making any disposition of his property either by will or deed. Upon the whole, the case admits of this easy solution: for some reason the testator took upon himself to dispose of his estate, partly by will, and partly by deed, but in regard to (157) the *capacity* of a deed to carry into effect his wishes, he happens to be mistaken; and the quicksand to be guarded against, is an inclination to effect his intention as gathered from the deed, at the expense of the law. To carry into effect the wishes and designs of every man, where they were intended for benevolent purposes, must be a pleasant office to every Judge. It calls into action the noblest qualities of the heart, and we strive to see things against the conviction of our own senses. The injurious influence of these feelings has often been felt, where departures from a known rule, for the sake of justice, have become so various as to destroy all rule. The rules of law are the rules of property, and the less they savor of construction, the more wholesome in their operation. Where the law has given a definite signification to certain terms of art, they are, when used, to be received in that sense, unless it shall appear they were used through mistake. A will is a term of art; and so is a deed. They are both conveyances known to the law, and are governed by distinct and separate rules. The difficulty often occurs in determining the nature of the conveyance, and in law as in physic much mischief may happen in mistaking the case. If *Allison* knew he was making his will, at the time he executed the paper first stated in the record, it is equally true that he knew, and intended not to make his will, but his *deed*, when he executed the latter paper. And after all, what are the particular hardships in this case, which should excite an interest in favor of a will? To say the least of it, it is an attempt to do indirectly, what the pol-

icy of the law forbids directly; it is to give to a set of aliens the benefit of real estate; not by holding out a temptation to migrate and become citizens of the United States; but to enable them to withdraw from this country its whole value without leaving anything in return, to the exclusion of heirs, citizens of the state and capable of inheriting.

(158) *Hawks*, for appellee.—Two inquiries are here presented; the first, is the paper, in form a deed, to be considered testamentary? and if it be, secondly, is the attestation sufficient under our law? It is in this order that the questions naturally arise; for an examination to ascertain whether a paper be attested with the formalities required by law in the execution of wills, is quite unnecessary, if the paper attested is not in law a will; and as the view taken by the counsel for the appellees on both questions coincides, I shall not trouble the Court with observations on both, but shall confine myself to the first question, leaving to my colleagues the discussion of the second.

And on the first point made, we affirm, that so far as the *form* of the instrument offered as a will is important, there can never be but one inquiry, viz., does the paper on its face show that its maker intended thereby to provide for the disposition of his estate *after death*?

Adverting to English cases decided since these statutes on the subject, we find, that at no period has any form of words been deemed essential to make a testamentary disposition or will. A will was defined to be, "a declaration of the mind in disposing of an estate, and to take place after the death of the testator" (*Carthew*, 38); and in accordance with this definition, a series of decisions is to be met with, in which writings, in almost every variety of form, and agreeing only in the grand essential of indicating a disposition *after death*, have been held wills. Thus, a writing in the form of a *deed* has been held a good will. *Hickson v. Witham* (*Finch*, 195); *Ridgen v. Vallier* (2 *Ves.*, 252); 1 *Ch. Cases*, 248. So also in the form of an *indenture*. (*Dyer*, 166; 2 *Leon*, 159.) In the form of *articles of agreement* (*Greene v. Proude*, 1 *Mod.*, 117); 3 *Keble*, 310. It may be in the form of a *letter* (*Moore*, 177); *Habberfield v. Browning* (4 *Ves. Jun.*, 200, *note*). And

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an endorsement upon a promissory note, "I give this note to A," may be proved as testamentary. *Chaworth v. Beech* (4 Ves. Jun., 565). In North-Carolina, the question is not new, and it has been here held that a will may be in the form of a deed of gift. *Executors of Henry v. Ballard & Slade* (4 N. C., 595).

It may hence be assumed without fear of contradiction, that had the act of *John Allison* stopped with the execution of the first paper, it alone might have been supported as a testamentary disposition; but it was but *part of an act*, for after making it, he immediately proceeds to the execution of the second paper, referring in it distinctly to the contents of the first. What was the effect of such language of reference, is our next enquiry; and on this subject we assert, that if a testator in his will, refers expressly to any paper already written, and has so described it that there can be no doubt of its identity, and the will is formally executed, that paper makes part of the will whether executed or not. *Methum v. Duke of Devon* (1 P. Wms., 529, *Cox's Ed.*); *Smart v. Prujean* (6 Ves. Jun., 560); *Habergham v. Vincent* (2 Ves. Jun., 205; S. C.; 4 Brown, 353); *Milledge v. Lamar* (4 Dessaus, Ch. Rep., 623).

An examination of the two papers executed by *John Allison* shows a distinct reference in the last to the one first written, and there can be no doubt of the identity of the paper referred to, from the description given of it by *Allison* himself; and the decision below is sanctioned both by reason and authority, for the proposition laid down by us on this subject of reference, is in the very words of *Mr. Justice Wilson*, in the opinion which he delivered in the case of *Habergham v. Vincent*.

Badger, on the same side. — I propose to discuss the second question, was the will duly executed to pass real estate?

HALL.—Is the paper in the form of a deed of trust revocable?

Badger.—It is clearly testamentary in itself, as we think has been satisfactorily shown, and, being testamentary, is revocable. But the will made the same day having referred to it, and being insensible with-

out it, what it would be of itself is not important. For by the words of reference it is made part of the will, as entirely as if incorporated with it and written at length on the same sheet; whatever be its character and whatever would have been its operation if it stood alone. It becomes a part of the will because of the reference, and not on account of its own character; because the will needs the explanation afforded by it, and the testator refers to it for that explanation. This effect of words of reference is not peculiar to wills. In a case reported in *East (Weeks v. Maillardet, 14 Vol., 568)*, the defendant, by articles under seal, covenanted to deliver to the plaintiff "the whole of his mechanical pieces as per *schedule annexed*." The schedule was not annexed at the execution of the deed; and upon the plea of *non est factum*, it was held that the schedule formed part of the deed, which would not be sensible without it, and that the articles, though sealed and delivered, were not the deed of the defendant without the schedule. Yet the schedule possessed no one requisite of a deed; it was not sealed nor delivered, it passed nothing, but was a merelist of pieces. But being referred to by an instrument, it became part of that instrument, and the latter being a deed, the schedule was, by force of the reference, part of a deed. And so of the will, and the paper referred to by it, whatever may be the form or character of the paper standing by itself.

COURT. —Proceed with the argument you designed to offer.

Badger. —The act of 1784 requires a will of lands to be executed in the presence of "two witnesses at least, no one of which shall be *interested* in the devise of the lands."

What sort of interest is here intended? As no explanation is given of the act, the words were not used in any peculiar sense. The legislature presumed that the word *interest* had already a fixed and precise signification.

(161) Where is that signification to be sought? As the language is that of the makers of the law, addressed to the Judges and to be expounded by them, the meaning is to be sought for in the common law. But the subject of legislation is the qualification of witnesses. The interest referred to is, therefore, such an interest as, according

to the rules of the common law, will disqualify a witness. It seems clear, however, that the interest to disqualify must be beneficial. A mere legal estate without benefit, whether in an executor or trustee under a will, or grantee in a deed, is no disqualification; and it will be shown that *Yarbrough* had no other interest.

Executor may be a witness, unless he has the surplus given him by the will. (Per *Hale*, Anonymous, 1 *Mod.*, 107.)

Executor in trust, though he has acted and made himself liable to actions, is a good witness to support the will. *Lowe v. Joliffe* (1 *Bl. R.*, 365).

A will being lost, the Spiritual Court examined the executors as witnesses, and held good evidence by *Holt*, Ch. J., *St. Legar v. Adams* (1 *Ld. Raym.*, 731).

Where there are two wills of different dates, held, that the person who had administered under the first will, was a competent witness to prove a codicil subsequent to both wills, by which the second was revoked and the first republished; although he had, by acting under the first will, subjected himself to actions as executor *de son tort*, in the event that the second was the true will. *Bailie v. Wilson* (cited by *Ld. Mansfield*, 4 *Burr*, 2254).

Grantee, where he appears to be a bare trustee, is a good witness to prove the execution of the deed to himself. (Per *Ld. Cowper*; *Gross v. Tracy*, 1 *P. Wms.*, 290).

"It is clear that an executor may be a witness." (Per *Wills, J.*, in *Goodtitle v. Welford*, *Doug.*, 141.)

Executor in trust is a competent witness at law. (1 *Ball & Beatty*, 100, 414.)

But it is said *Yarbrough* has a *beneficial* interest, because the trustees are authorized by the will to retain a compensation for their trouble.

Answer. First. No legacy is given. If *Yarbrough* were dead, nothing would pass to his representatives. It is a mere contingency upon his acting, and then a *quantum meruit* for his labor. There is no bounty, no benefit, no fixed sum. Secondly. The will gives him nothing; for had this provision been admitted, the law would have allowed to the *acting* executors commissions for their trouble. Thirdly. The will itself shows it to be a mere appointment to a troublesome office, and not an interest

which could be transferred by law, or assigned by the trustee; for it is provided, that in the event of the death, removal, &c., of any of the trustees, another shall be appointed in their stead by those surviving or remaining.

But if *Yarbrough* had ever such interest as would, if subsisting, disqualify, we insist, that by the release it was discharged, and the will is well proved.

As English cases will be referred to in support of this proposition, it is necessary first to ascertain if the English statute and Court are so far alike that those adjudications are authority here.

The expression in the stat. of *Charles* is, "three or four *credible* witnesses." Whatever doubts exist as to other questions upon this statute, it is clear that credible means competent, and that competency is implied by the word witness. There are two causes which produce incompetency, infamy and interest. An infamous person is clearly not a witness under either of the statutes, for infamy destroys *all* ability to testify. As to *interest*; under the English statute, if the witness be interested he is incompetent; and if without interest, he is competent. So under our statute. Interest makes him incompetent; and if incompetent it can only be because he is interested. The two acts, then, are (as to this question) equivalent, and decisions upon the one are illustrations of the meaning of the other.

The judgment of the Court of King's Bench, delivered by *Ld. Mansfield* in *Chetwynd v. Windham*, is in point to establish the proposition laid down by us. (1 *Burr*, 414.)

In this admirable opinion, the distinction is clearly stated between infamy and interest, as sources of incompetency. The former, as positive disqualification of the person; the latter, only a ground of rejection, upon a presumption of bias being produced by it. And hence, when the witness voluntarily releases his interest, from which the bias was supposed to arise, the presumption is repelled, and the supposed bias shown not to have existed at all; for "presumptions stand no longer than till the contrary is proved."

The opinion of *Lord Camden*, in the case of *Doe v. Kersey*, is relied on by the other side, and stated as of greater authority and decisive against us. (For the opinion in

Doe v. Kersey, vide *Cunningham*, L. D. verb. Will, where it is printed at length.)

The first observation that occurs is, that this opinion was not the judgment of the Court. The three other Judges united in a contrary view, and the Chief Justice dissented. It is not, therefore, authority.

Again, the question of the effect of a release, was not presented in the case, for the interest, whatever it was, continued up to the time of the trial in the same plight as at the attestation of the will; consequently the opinion was a mere *obiter dictum*. It was delivered (as is intimated not obscurely in the opinion itself) merely to measure strength with *Lord Mansfield*, by contesting the doctrine advanced by him in *Chetwynd v. Windham*.

But what is the difference between them? They both agree that credible means competent. *Lord Camden* holds that competency "is essential at the time of the attestation." So does *Lord Mansfield*, for he lays down the rule "that a person shall not entitle himself to a devise by virtue of his own subscription, which at the time of subscribing he could not have proved by his examination." (1 *Burr*, 424.)

But clearly the witness who has a legacy is competent (164) to prove the fact that the will was made at the time of attestation. Suppose the question if the will had been made, to arise living the testator (as upon a wager), could it be objected that the witness then had an interest? Until the testator's death the will is inchoate, ambulatory, may be revoked; the witness may die and the legacy lapse. Nothing passes till the testator's death. Until that event, the legacy is a mere possibility, not an interest. But it is said by *Lord Camden*, that the statute was meant to protect testators against fraud; and *Lord Ch. J. Lee* observes (*Austey v. Dowsing*, *Strange*, 1253), that at the time of attestation the witness is under a temptation to commit a fraud. Now, it may be observed these Judges have left the ground of that interest which disqualifies, and have assumed the general and indefinite position of a temptation to commit a fraud, by which it is clearly admitted that there is no interest in the witness. But *Lord Mansfield* furnishes a conclusive answer. He observes, "the presumption of bias arises at the time of sub-

scribing;" but "during the life of the testator, devises are mere possibilities," and "the presumption of bias from the *possibility*, is answered by the fact when it becomes an interest."

Lord Camden stigmatises this doctrine of *Lord Mansfield* as "pregnant with mischief and absurdity." From himself, therefore, we have a right to expect a doctrine free from both. But what is his construction? A witness having a legacy, is presumed under a bias to commit a fraud; the testator dies, and the witness refuses the legacy and releases all right to it; and still he is presumed by his Lordship to have been tempted by it to a fraud. What is the fraud intended? To fabricate a will? What the motive? To procure a legacy. How is the witness to carry this fraud into effect? By renouncing the legacy which was the only motive to contrive or execute the fraud. A judge whose construction of a statute against (165) frauds leads to such results, can have little right to object to the judgment of another on the score of absurdity.

But farther, the opinion of *Lord Camden*, taking it as law, does not affect this case; for he admits the general practice of Westminster Hall had been, that a release was sufficient; and says, "this practice is a weighty argument, and should never be slighted." But he alleges, the practice to have been confined to money legacies, and did not extend to a witness who was a *real devisee*. In our case, the compensation, if a legacy, is but a *money legacy*.

The statute, 25 *Geo.*, 2, *ch* 6, furnishes a strong support to the construction contended for by us. The act not only prescribes a rule as to the execution of wills thereafter to be made, but expounds the meaning and intent of the statute of *Charles* as to wills already made. It declares that a witness who shall have released his legacy, whether the same were charged upon lands or not, shall be admitted as a witness, &c., within the intent of the said act.

The case of *Austey v. Dowsing*, cited on the other side, was where the legacy and an annuity charged upon lands, were neither paid nor released; and the decision of the Court was merely that a tender of the *legacy* to the witness, which was refused, did not restore the competency. The reasoning of *Lee, Ch J.*, was not of the other Judges. (Vide 1

Burr, 427.) Besides, in that case a writ of error was brought, and the Judges being divided in opinion, a compromise ensued, and no final decision was had. (Vide *Prize v. Lloyd*, 1 *Ves. Jun.*, 503.) The opinion of *Lord Hardwicke* was the same with that of *Lord Mansfield*. *Ibid.*)

We are supported, then, by the general practice of Westminster Hall, the resolutions of the Courts, and a legislative exposition of the statute of frauds, and opposed only by the opinions of *Lord Camden* and *Ch. J. Lee*, in which the brethren did not concur.

But farther, if the technical strictness demanded (166) on the other side is to obtain; if the appointment with compensation for the trouble of executing it, when the person appointed has renounced and therefore never had for a moment any right to such compensation, is to be considered a benefit; then we ask the application of the same strictness of construction throughout. The statute says, "interested in the *devise* of the lands." But here is no devise to any one. There is not an expression which passes any estate. The words "assign, &c.," quoted by the adverse counsel, relate, not to the real property, but to the bank stock.

If we look to the spirit of the law, there is clearly no such benefit as could have been within the contemplation of the legislature. If we are to confine ourselves to the words, a *devise* of lands only is mentioned, and here we have only a naked power to sell, coupled with no legal estate. And in either way, the objection must fail, and the will be established.

Gaston, on the same side.—The paper commencing "Know ye," is a *will* in itself. A will is defined to be a lawful disposing of that which one would have done after death. (1 *Swimb.*, 25, *Co. Lit.*, 111; *Carthew.*, 38.)

The paper here alluded to passes no *immediate* right, either of present or future enjoyments; it does not contain the words, "bargain and sell," nor any thing equivalent thereto. (*Shep. Touch.*, 219.) As to the property mentioned in the paper, the lots of land are not conveyed thereby, but authority is given to sell them after his death; the bank stock, if not sold before his death, is assigned to

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be sold "after my death." The language used throughout shows, that the disposition of this property after his death was what he designed to declare. Thus he says, "giving my trustees as full power as if I were living," "the money to be applied to the purpose mentioned in my will," "debts due, at my decease, to be collected," "physician's bill and funeral charges to be paid:" and he concludes the paper with directions relative to his interment. There is no proof that this instrument ever passed out of *his hands* during his life; and he gave directions to have it recorded after his death.

That paper is itself a will, follows from the clearest elementary principles and from authorities; for, as has been observed, there is no appropriate form of instrument required for a will; and to the authorities already cited for the appellee, may be added the following:

A man beyond sea wrote a letter, in which he expressed his wish that his lands after his death, should go in a particular manner; held to be a good will. (*Moore*, 341, *pl.*, 363; 2 *Danv. Ab.*, 539; *Gillb. on Div.*, 85.)

So a writing in the form of a bill upon a banker for 100*l.* to buy mourning for the wife of the writer, has been held a will. *Lawson v. Lawson* (1 *P. Wms.*, 440).

So also in the form of a letter stating the contents of a will, but adding a farther expression of his wishes. *Hall v. Hewer* (*Ambler*, 203).

So, in the form of a deed of gift, not to take place until death, accompanied by the delivery of six pence by way of putting grantee in possession. *Shargold v. Shargold* (2 *Ves.*, 440).

See also the cases of *Olymer v. Little* (1 *W. Bl.*, 345), and *Peacock v. Monk* (1 *Ves.*), establishing the doctrine for which we contend: and in the celebrated case of *Haberg-ham v. Vincent*, already referred to, the language used is remarkably strong. "It is immaterial whether testator calls it a deed or a will; if it does not take effect on its execution; if the interest, powers, and capacities, which it designs to create do not *arise* until after death, although there be express words of immediate grant, and a consideration to support it as a grant; if on the whole, the intention is, that it shall have a future operation after death, it must be regarded as a will." And to the same effect are

all the respectable elementary writers. (Com. Dig., (168) "Devise," A. 1 D. 1, 4 Cruise, 156; Powell's Swinb, 77; Roberts on Wills, 73.)

But this instrument, if not in itself a will, is expressly referred to, and adopted, confirmed and incorporated into a will, dated and executed the same day before the same witnesses: it is as completely incorporated as if repeated *verbatim et literatim*. *Habergham v. Vincent*, and *Milledge v. Lamar*, already cited, and *Pow. on Dev.*, 23.

But it is said that the test of a will is its revocable quality; and it has been asked if this instrument could have been revoked. It is a mistake to say that this is the test of a will, for an instrument may be revocable and yet not a will; e. g. a deed reserving a power of revocation, a letter of attorney. An instrument may be testamentary, and yet not being *wholly* so, may in part be irrevocable. Thus, a deed for life is made, afterwards a will referring to it, and declaring that the testator confirms the disposition made by the deed, and after the death of the grantee gives the property to his heirs; it cannot be doubted but that, he takes a fee simple under the will; yet the first instrument is not absolutely irrevocable.

But in this case *all* the disposition of the paper are revocable. It is not stated, and therefore cannot be presumed, that *Allison* ever *delivered* the paper so as to make it his deed, and in fact the opposite counsel have agreed on the fact of his having retained it. Now without delivery, if the words were sufficient, *nothing* passed, and until the owner had divested himself, he might do as he pleased with the property. But if he had delivered the paper, *nothing* passed, for there are no operative words in it to give an estate as to the lands for *one moment*, it is a mere power of attorney; the trustees could not have turned *Allison* out, or brought an ejectment against any person in possession. As to the bank stock, the retaining an unqualified power to sell, makes the assignment to the trustees, for sale after his death, purely a naked power.

(169) *Ide v. Ide* (5 *Mass. R.*, 500). Why in general is a will revocable? *Solely*, because it is to have no operation until death. (*Lit.*, s. 168; *Co. Lit.*, 12 a. b.) But be this as it may, after the incorporation of this paper into the will, if before it had been a deed *inter vivos*, it

then had a new and additional operation; it is made part of that will, and whatever it cannot effect as a deed, it shall then effect as a testamentary disposition.

The second question which has been made is, was this will duly attested, *Yarbrough* being one of the witnesses; can it operate to pass real estate? The answer to this question depends on the construction of our act of 1784, and of the words in it, "no one of which shall be interested in the devise of said lands."

Unless it can be shown that *Yarbrough* is incapacitated, the will is well attested. The interest which excludes must be *certain* and *fixed*. Did he then ever have an *interest* in the devise of these lands? The intention of the legislature in requiring an exemption from interest in the witness, shows, that by interest they meant, not a nominal, but a *beneficial* interest. The interest which by the common law incapacitates a witness must be a beneficial, not a formal one. (*Gilb. Ev.*, 123; *Peaks*, 156, 162; 1 *Mod.*, 107; 12 *East*, 250; 7 *Mass. R.*, 398; 4 *Taunt.*, 326.) Here no beneficial interest is given to *Yarbrough*; he is a mere attorney, taking nothing under the will, entitled to nothing, except compensation for trouble and services, *should he ever render them*.

Again, if mere formal, technical interest will exclude, he has not here (as will be found on examining the instrument) even such an interest given him; it amounts to a mere *naked power to sell*. (*Lit.*, 169; *Co. Lit.*, 112; *a. Pow. on Dev.*, 292, 3, *et. seq.*)

A mere agency is offered to him, no legacy or devise accompanying it, nothing but a compensation for trouble, and that not *fixed*, but a mere *quantum meruit*, and necessarily conditional on his acceptance of the office and (170) performance of the duty. It is not accepted, he refuses to perform; and where, we ask, is his interest under these circumstances?

Yarbrough has released. The great controversy in England whether a witness interested could release, arose on the word "*credible*" in the British statute; and even then, the entire weight of authority is in favor of the release. The case of *Hilliard v. Jennings* (1 *Ld. Ray*), cited on the other side, decides nothing about it either directly or indirectly. *Austey v. Dowsing* (2 *Strange*), is not founded

on it; it contains only an *obiter* remark of *Ch. J. Lee*, and was compromised during the pendency of an appeal. (See 1 *Ves. Sen.*, 503.) In *Doe v. Kersey*, *Lord Camden* was alone. (See *Powell*, 132.) *Lord Hardwicke* clearly thought otherwise; (1 *Ves.* 503, and 2 *Ib.* 374), as did *Lord Mansfield* and the Court of K. B., in *Wyndham v. Chetwynd* (1 *Burr*); and *Goodtitle v. Welford* (1 *Doug.*, 140). See also 2 *Bay.* 448; 3 *Har. & M'Hen.*, 513; 5 *Mass. R.*, 228, 9.

Our act of 1784 uses no such doubtful word, but states what disqualification on the score of interest shall incapacitate the witness. The act cannot *well refer* except to the moment of death, "shall be interested, &c.," besides the witness can take no interest until death.

The act makes this species of interest disqualification; but one of the same character with all other disqualifications on the score of interest. As to these disqualifications, how did they stand? A legatee could not prove the will and *keep his legacy*, nor a devisee be a witness *without a release*. So by our law, lands shall not pass, unless the will be attested by two witnesses, no one of whom shall take. The presumption is, that all will take a benefit, but this presumption is entirely removed by a release.

But farther, if any interest is given to *Yarbrough*, it is a *pecuniary legacy*, which affects not the *attestation* to the devise.

TAYLOR, Chief Justice.—It may be satisfactorily (171) inferred from the cases cited, that any writing by which the intention of the party to dispose of his estate after his death appears, will amount to a devise, provided such intention be consonant to the rules of law, and the writing have the formalities required by the act. It is of no moment whether the testator would have called the instrument a deed, or a will. The true inquiry is, how will it operate? and if the provisions in it are testamentary, it must operate as a will. The difference between a deed and a will is this: the former must take place upon its execution, or never; not by passing an immediate interest in possession, for that is not essential; but it must operate as passing that interest when the deed is executed. Thus, where a father covenants to stand seized to the use of his

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son, reserving a life estate to himself, the deed takes effect at once, by passing an interest to the son. But a will can only operate after death. Does this instrument convey to the trustees any power or capacity of acting till after the testator's death? It assigns over and conveys to the trustees, what? not any property; but "that immediately after his decease, or as soon thereafter as may be found convenient," he authorizes them to sell his bank stock and real estate, and apply the proceeds in the manner he directs. They are not authorized to take a single step in the business of his estate, till after his death; nor does he part with, or impair, his dominion and control over the property while he lives; indeed, it is a plain manifestation of what his intent was, that he directs the instrument to be recorded, only after his death; and there is no reason to believe that he ever parted with the possession of it during his life time.

In *Hixon v. Witham* (1 Ch. Ca., 248), the writing was in the form of an indenture, and used the terms "grant, bargain and sell," yet it was decreed to be a good will. In *Proude v. Green* (1 Mod., 117), articles of agreement, which used the word "give," and were delivered as an act and deed, were held to be a will. The cases (172) generally established the position, that whatever the instrument may be called by the party, or however it may be considered by him, if the intention upon the whole be, that it shall not operate before his death, it is then testamentary. In addition to this, there is much weight in the reasoning, that this paper is so plainly referred to and incorporated in the will, as to become a part of it, although it had not been duly executed. But then it is indispensable, that the will should be executed according to the directions of the act of 1784. This is the only part of the case in which I have entertained any doubt; but after much consideration my opinion is, that it is not attested by two such witnesses as that act requires. If the act had merely required the will to be attested by two witnesses, the common law would have instructed us, that their competence at the time of the proving the will, would have been sufficient. The words which follow in the act, *two witnesses at least, no one of which shall be interested in the devise of said lands*, must be supposed to

have been inserted for some purpose; and this could only be to refer to their competence at the time of attestation.

The preamble to this section of the act, professes to guard against the undue influence of those about a testator in his last moments; and it must be a strong inducement to attempt the exercise of this influence, if a witness is interested at the time of his attestation. The subsequent act of 1784, asserts, that it was the design of this requisite of the attestation of witnesses, to prevent fraud and imposition.

The statute of frauds required a will to be attested and subscribed in the presence of the deviser by three or four *credible* witnesses. Much difference of opinion existed whether this competence (for so the word was understood) should be referred at the time of the attestation, or to that of proving the will; and I think it difficult to read the cases on this subject without a conviction that the weight

of authority, as well as reasoning, is in support of (173) the former opinion. In one of the earliest cases to be met with on this question, the testator disposed of his real estate by will, and gave to one *J. H.* and his wife 10*l.* each for mourning, with an annuity of 20*l.* to *E. H.* the wife of *J. H.* The will was attested by three witnesses, whereof *J. H.* was one. The legacies and satisfaction for the annuity were tendered and refused. The question upon the special verdict was, whether or not the will was well attested according to the statute of frauds. The Court was unanimously of opinion, that the right to devise lands was not a common law right, but depended upon the powers given by the statutes, the particulars of which were, that a will of lands should be in writing, signed and attested by three *credible* witnesses, in the presence of the deviser; that these were checks to prevent men from being imposed upon; and certainly meant that the witnesses to a will (who are required to be credible) should not be persons entitled to any benefit under that will. In answer to the objection that nothing vests till the death of the deviser, and therefore at the time of the attestation the witness has no interest, the Court said, that he was then under the temptation to commit a fraud, and that is what the parliament intended to guard against; that the true time for his credibility is, the time of his attestation;

otherwise a subsequent infamy, which the testator knows nothing of, will avoid his will. *Austey v. Dowsing* (2 *Stra.*, 1254).

Lord Camden's opinion, though at variance with that of the Judges who sat with him in the case of *Hindon v. Kersey*, deserves much weight, not only from its cogent reasoning, but from the circumstance that the legislature, within a few years after its delivery, adopted its policy and principles, by destroying the interest of the subscribing witness, whatever it might be at the moment of attestation. This was by the act of 25 *George*, 2, passed about thirty years before our act of 1784. The whole controversy must have been known to many members of the

legislature of that day, and I think they had the (174) same policy in view though they have pursued a different course to attain it. The question to be asked on the will is, whether the testator was in his senses when he made it, and that is the important moment when vigilance and caution are most necessary in the witnesses, and when their minds should be most free from any bias that might warp their judgment. In other cases, according to the opinion quoted, the witnesses were *passive*; here they were *active*, and in truth the principal parties to the transaction. The testator was entrusted to their care. The design of the statute was to prevent wills from being made, which ought not to have been made, and always operates silently by intestacy. It is true the design of the statute was to prevent fraud, though no fraud appeared in that case, yet it prescribes a certain method, which every one ought to pursue to prevent fraud. As to the minuteness of the interest, as there was no positive law which was able to define the quantity of interest which should have no influence upon men's minds, it was better to have the rule inflexible, than to permit it to be bent by the discretion of the Judge.

Under this construction of the act of assembly, which, however reluctantly, since it disappoints the will of the testator, I think the true one, my opinion is, that the witness was disqualified, since he, and the other trustees, were authorized to retain a sufficient compensation for their trouble. This gave them an interest in the devise of the lands, and would, upon common law principles, render

them incompetent to prove the will, as to the land. Though in England, the office of executor who has no commissions or a legacy, is a burthensome one, and never injurious but from mismanagement.

HALL, Judge.—There can be no doubt but that the paper writing which purports to be a will of the personal estate, was properly proved in the County Court, (175) and that the judgment given thereon in the Superior Court affirming, it was correct. But the question in reality submitted to this Court is, whether, first, the paper writing purporting to be a deed, was in its nature testamentary; and if so, secondly, whether it was legally proved, as the law prescribes. My opinion on the last question renders it unnecessary to give an opinion upon the first.

The second question, in substance, is, whether *David Yarbrough*, who is a subscribing witness to that deed, with *William Horton*, the only other subscribing witness, was in law a proper witness to prove its execution. He is one of four trustees named in that instrument, for the purpose of selling the real estate of *John Allison*, who executed it; and there is a clause in it as follows: “and the said trustees are hereby authorized and directed to retain to their own use out of the moneys that may come to their hands, a sufficient compensation for their trouble in performing and executing the trust hereby reposed in them, and also for discharging any debt that may arise from the sick or death bed, or physicians’ aid if required, and funeral charges.”

By the act of 1784, *New Rev. ch. 204, sec. 11*, it is enacted, that no last will or testament shall be good, in law or equity, to convey any estate in lands, &c., unless such will shall have been written and signed by the testator, and “subscribed in his presence by two witnesses at least, no one of which shall be *interested in the devise of said lands*.” This act is supposed, by the plaintiff’s counsel, to have a resemblance in principle to the devising clause of the English statute of frauds, in which it is declared, that all devises shall be attested and subscribed in the presence of the devisor by three or more *credible witnesses*, or else shall be utterly void and of none effect. The point

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has been much controverted in England, whether the subscribing witnesses should be credible or competent at the time of attesting the will, or at the time when (176) called upon to prove its execution. The question has also been examined with ability by the counsel in this case. I do not think it necessary to give any opinion on it, because I think the act of 1784 puts the question at rest. I will only say, that if the test of qualification is to be applied at the time when the execution of the will is attempted to be proved, it appears to me that the term credible, is a dead letter in the statute, because the rules of evidence would not permit any other competent witnesses (which *Ld. Mansfield*, in 1 *Burr*, 414, says the term credible witnesses in the statute means), to be examined to prove the execution of a will, if the statute had not made such provision.

The same remark may be made as to the act of 1784. If a subscribing witness to a will is interested in a devise therein, and afterwards becomes disinterested by a release, or by any other means, and thereby a good witness, the clause would be inserted for no purpose, which declares that "no one of which shall be interested in the devise of the said lands," because if no such provision had been made by the act, the rules of evidence would prevent any witness from being examined who was not at the time disinterested.

But I think the legislature, by the act in question, intended to remove temptation out of the way, and not suffer wills to be made through the procurement of fraud; and this they could not better accomplish than by not suffering any person to attest a will, unless at the time the person so attesting was disinterested in the thing devised.

If, therefore, *David Yarbrough* had an interest in the instrument he attested, at the time he attested it as a witness, the release by him made, will not restore his competency.

The clause which I have before recited furnishes employment for him and gives compensation for it. It is like the common case of allowing commissions on the amount of the business transacted. The case does not resemble those cases where witnesses are received from ne- (177) cessity, and for the sake of trade, as when a person

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is employed to sell goods, and is to have a certain per cent. on the amount sold, he is competent to prove the contract of sale. (2 H. Bl., 590; 3 Wils., 407.) See *Guillim Bac. "Evidence B.;" Norris' Peake*, 240. It is very true, the interest of the witness in this case is very small; but this Court, on that account, cannot overlook it; it cannot judge between different degrees of interest. If this objection was overruled, at some future time a witness somewhat more interested might be offered; and so on, till the rule which rejects interested witnesses would be done away altogether. The rules of evidence are of great consequence. *Lord Kenyon* says, our laws, liberties and property depend upon them; they ought to be preserved inviolate and unshaken. For these reasons I am of opinion, that *David Yarbrough* (whose character is admitted to be pure and upright) is not in law a competent witness to prove the paper writing (which on the face of it purports to be a deed), which, in the Court below, has been offered and proved as a will.

HENDERSON, Judge.—There is no dispute as to the instrument in the form of a will. I am of opinion that the other paper, in form a deed, is testamentary as regards the personal property therein mentioned. I am rather inclined to think that it is not testamentary as regards the real estate; but on this point I wish it understood that I give no opinion, as it is unnecessary, for if it was testamentary, I think that it is not sufficiently proven; *Yarbrough*, one of the two attesting witnesses, being therein appointed a trustee for the sale of the lands, and entitled to a compensation for his services therefor; for the disqualification relates to the time of attestation, and not to the time of giving evidence.

I concur in the opinion, that the judgment of the Superior Court be reversed so far as the probate of the said last mentioned instrument is established, and affirmed (178) as to the other parts of the judgment; and that the plaintiffs pay the costs of this Court, and that the defendants pay the costs below, so far as regards the establishment of this instrument as a will of personal estate, and that the plaintiffs pay the residue of the costs.

Approved. Daniel v. Proctor, 12 N. C., 428; *Old v.*

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Old, 15 N. C., 500; *Matthews v. Marchant*, 20 N. C., 40; *Tucker v. Tucker*, 27 N. C., 161; *Morton v. Ingram*, 33 N. C., 168; *Huie v. McConnell*, 2 Jones, 455.

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From Tyrrel.

Where a law suit is pending between two parties relative to the title of a vessel, and they enter into a parol agreement to settle all law suits and matters in controversy between them; and afterwards the plaintiff in the law suit, instead of dismissing it, takes a judgment by default, and is thereupon sued on his breach of the contract of settlement; in such suit either party may introduce parol evidence to show how his rights, as to the vessel, stood at the time of making the contract of settlement, because by so doing it would more satisfactorily appear whether those rights were taken into consideration in making the settlement.

The compromise of a doubtful right is a sufficient foundation for an agreement.

Chaplin, the defendant in this action, had brought an action of trover in Currituck County Court, against *Truett*, the present plaintiff, to recover damages for the conversion of a certain vessel called the Farmer's Daughter; both parties claiming to have title to the vessel.

Chaplin had also stayed *Truett*, by injunction, from carrying away the vessel.

During the pendency of these suits, and before *Truett* had pleaded to the action of trover, or answered the bill of injunction, *Chaplin* and *Truett* came to a parol agreement to settle all law suits and matters in controversy between them. *Truett*, in compliance with his part of the agreement, delivered to *Chaplin* his obligation for \$75, and his written promise, with security thereto, to deliver to *Chaplin* 100 gallons of molasses on a certain day; and (179) *Chaplin*, in consideration thereof, agreed to dismiss his suits within ten days and pay his own costs; and in further performance of the agreement, *Chaplin* gave to *Truett* a receipt for six dollars in full of all demands and law-suits which he, *Chaplin*, had against him, *Truett*.

After this agreement between the parties, *Chaplin*, without the knowledge or consent of *Truett*, took a judgment by default in the action of trover, afterwards exe-

cuted a writ of inquiry, and obtained final judgment for \$2,240, issued his execution, caused it to be levied on the Farmer's Daughter, then in *Truett's* possession, sold her under the execution, and became himself the purchaser at the price of \$750, and took the vessel and carried her away.

For *Chaplin's* breach of contract, *Truett* brought this action in Tyrrel County Court, whence it was carried by appeal to the Superior Court, and tried before DANIEL, Judge.

Truett, on the trial, proved by the only three witnesses who knew any thing of the contract, the terms of it as in substance above stated; and farther, that *Chaplin*, when he made it, was not intoxicated but sober; that it was made between the hours of eleven and three of the 21st day of June, 1822. He proved also, by the person who wrote the receipt for \$6 before mentioned, the signing of it by *Chaplin*, though the witness did not see the money paid.

The defendant, in his defence, alleged, that he expected to prove that *Truett*, at a sale made by the wreck master in Carteret county about two years before this contract, purchased the Farmer's Daughter for *Chaplin*, the former owner, and afterwards held her claiming her as his own. This evidence was objected to, but the Court received it. And much contradictory evidence was given of the declarations and conversations of the parties, tending to show that, at the time of the contract, the title to the Farmer's Daughter was in the one or the other.

Chaplin contended, also, that the two notes (180) which *Truett* had given him as above mentioned, were for the freight of the vessel from North-Carolina to Bermuda.

The Court charged the jury, that if the defendant agreed to dismiss his suits in Currituck and did not do it, the plaintiff was entitled to recover; and if they should be satisfied that *Truett* had purchased the vessel at a wreck sale, or had title to the vessel, then they should give damages to the amount of her value; but if they were of opinion that the vessel belonged to the defendant, and the sums mentioned in the two notes were the price of the freight of the vessel to Bermuda, then the plaintiff was

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entitled to recover but nominal damages for the breach of the contract, as no other property was levied on, or other injury shown. The Court further charged, that if the vessel was the property of the defendant the agreement to dismiss the suits in Currituck, on a settlement of all transactions between them, did not divest the defendant of his property in the vessel; but that the defendant would be permitted to set up his title whenever he could fairly get the possession. All the plaintiff could claim would be damages for a breach of contract.

Verdict for defendant, new trial refused, judgment and appeal.

Gaston, for appellant.

L. Martin, for appellee.

HALL, Judge.—There are two objections made in this case to the opinion of the Court. The first relates to testimony offered by the defendant; the second to the charge given to the jury. With respect to the first, I think it is not sustainable. The contract by which it was alleged the parties had settled their disputes, were not committed to writing, and there could be no objection to either party's showing how their rights stood at the time when such contract was entered into, because by doing so, it would more satisfactorily appear whether those rights were (181) taken into consideration and included in it. If they were included in the contract, such evidence would not and ought not to have any tendency to invalidate it; if they were not, the contract, as to them, was a nullity, and the evidence was properly allowed.

The other objection is, that the jury was told "that if the vessel was the property of the defendant, the agreement to dismiss the suits in Currituck, on a settlement of all transactions between them, did not divest the defendant of his property in the vessel, but that the defendant would be permitted to set up his title whenever he could fairly get the possession."

This objection I think sustainable, because if the right of the vessel was an item in the settlement of all transactions between them, that right vested in the person to whom the settlement gave it; and was divested out of the other party in case he had a right to it before that time.

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If an agreement is entered into upon a supposition of a doubtful right, it is binding. The compromise of a doubtful right is binding. (1 *P. Wms.*, 727; 1 *Atk.*, 10; 2 *Bl.* 448.) If either party should be imposed upon by the fraudulent conduct of the other, the case would be otherwise; such agreement might be set aside for fraud. But as that is not the case here, I think the rule for a new trial should be made absolute.

And of this opinion was the rest of the Court.

Judgment reversed.

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From Wilkes.

Where iron was left with one for a certain purpose, who after using part retained the remainder to his own use, a warrant cannot be brought; before a single magistrate, to recover the value of the iron retained; the act allowing warrants "for specific articles, whether due by obligation, note or assumpsit," does not embrace this case.

Perjury cannot, therefore, be committed on the trial of the warrant before the magistrate.

This was an indictment against the defendant for perjury, alleged to have been committed on the trial of a warrant by a magistrate. The defendant, on the trial below, before NASH, Judge, was convicted, and moved for a new trial on the ground that the oath alleged to be false was *coram non judice*, as the warrant was void. The warrant was in these words:

You are hereby commanded to take the body of Randolph Alexander, if to be found in your county, and cause him to appear before some Justice of the Peace for said county, to answer the complaint of Jesse Gambill in a plea of debt of 45 dollars, due by open account, and a hundred weight of bar iron, herein fail not.

The Judge refused the new trial, and from the sentence pronounced defendant appealed.

The case was argued by the *Attorney General* for the state.

TAYLOR, Chief Justice.—The three acts of assembly first passed for the purpose of increasing the jurisdiction of single magistrates, all employ the same language, viz., "debts and demands, where the balance due on any specialty, contract, note or agreement, or for goods, wares and

merchandise sold and delivered, or for work and labor done."

It must be a "debt and demand," and there must be "a balance due," which necessarily confines it to those (183) cases of express contract, where the sum due and the interest, must form the measure of the judgment. The utmost extent to which these words can confer a jurisdiction as to implied assumpsits, is to ascertain the value of labor, or the price of goods, where none has been agreed upon between the parties, and there has been an express contract of sale, or work done under a like contract. 1777, *ch.* 115; 1785, *ch.* 233; 1786, *ch.* 253.

The next act adds to the words, "or for specific articles, whether due by obligation, note or assumpsit." There must still be a balance due, and an express contract to deliver specific articles. This would add little to the difficulty of transacting the business, because the price of the article, when it was due, might be easily ascertained. 1794, *ch.* 414.

But if we go beyond these limits, and extend the jurisdiction to all cases of implied assumpsit and special agreements, where the sum sought to be recovered is not a balance due, but damages for the non-performance of an agreement, I apprehend we shall not only misconceive the views of the legislature, but charge magistrates with a duty, which but a small proportion of them is competent to discharge.

If this case were within the jurisdiction of a single magistrate, the cause of action must be the non-performance of an agreement to make a proper application of iron left with *R. Alexander*; the sum recoverable would not be a balance due, but damages for the breach of the implied contract, of which the value of the iron would not be the necessary standard; but if a jury were to try it, they would be at liberty to take into view any farther inquiry suffered by the plaintiff in consequence of the defendant's failure. It is, therefore, plain to my understanding that no jurisdiction is given, but in those cases where there is a balance due, and where, also, that balance may be ascertained by a fixed, definite standard, furnished by the parties when they made the contract.

Let it be considered for a moment, that a wide

(184) door of difficult, and, I may add, impracticable, jurisdiction, would be opened by a construction that should give to magistrates cognizance of all cases of assumpsit, express or implied. A person who should estimate the damage he had sustained as not exceeding a hundred dollars, might warrant for a breach of promise of marriage, upon a contract of guaranty or indemnity, against an attorney or physician for neglect of duty, against carriers and bailees of every description, upon express and implied warranties as to the quality or title of the chattel sold, and upon many other cases, which, although sounding in assumpsit, the ascertainment of what is due depends upon various nice and intricate points of law, which can scarcely be properly decided but by a jury aided by a Court.

This never could have been the intention of the legislature, nor will their language bear this construction, grammatically read; for "the balance due" restrains "debt and demand," and connects itself with every item of the ensuing enumeration.

HENDERSON, Judge.—If the Justice of the Peace before whom the false oath was taken had not jurisdiction of the matter then in controversy, the defendant is not guilty of perjury.

The defendant, *Willis Alexander*, was sworn as a witness on behalf of *Randolph Alexander*, the defendant, in a warrant brought against the said *Randolph*, returnable before a single justice of the peace, out of Court, by *Jesse Gambill*, in a plea of debt of forty-five dollars due by open account, and four hundred weight of bar iron, and among other things the said *Willis Alexander* deposed, that all the iron which had been brought, or received by the said *Randolph Alexander* of or on account of the said *Gambill*, had been worked up upon the wagon of the said *Gambill*. The indictment charges that the oath was material, false and corrupt; that four hundred weight

(185) of iron had been put on the plaintiff's wagon; and that the defendant had converted the balance to his own use. The act of 180— declares that all debts and demands of thirty pounds and under, for a balance due on any specialty, contract, note or agreement, or for work

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and labor done, or for specific articles, whether *due* by obligation, note or assumpsit, shall be cognizable and determinable by any one justice of the peace out of Court.

I will consider this case most favorably for the state, to wit, that the defendant in the warrant *expressly* promised to return what was left of the iron after ironing the plaintiff's wagon, for perhaps such was the fact.

The whole question depends on this, was that iron *due* from the defendant, *Randolph Alexander*, to the plaintiff in the warrant, within the meaning of that word in the act of 180—; was it a debt, was it an obligation or promise to pay? To pay, is to deliver to another that which belonged to the deliverer, and which delivery he was bound to make by some previous obligation; not the restoration to the owner of his own goods, and which had been out of his possession, or withheld from him. Property in the possession of a bailee is not *due* to the bailor; the bailee is not the *debtor*, but the trustee of the bailor until the trust is broken; the bailor has not a demand upon, or right of action against, the bailee; the possession of the bailee is the possession of the bailor. The whole phraseology of the act shows that the jurisdiction extends only to cases where there is an obligation to pay; as in the present case, if the defendant had promised to *pay* or *deliver*, that is, deliver as a *payment* four hundred weight of iron, there is no doubt but that the justice would have had jurisdiction; it would in such case be a debt. It is asked, where is the difference, in reason, between the cases? The difference lies in the obligation. If this had

been a promise to pay or deliver 400 *lbs.* of iron, (186) the utmost care on the part of the defendants to procure the iron, would not have absolved him from his obligation. Were he to show that he had sent to market to get the iron and none was to be had; or that, after getting it, it was lost, together with other iron of his own, in crossing a river; or that he was robbed, or that he was taken by the enemies of the state; this would be no defence, of course the justice would not be confided in to try them; he was only to examine into the demand and whether it had been satisfied, or such other defence as the defendants might have; but none involving the exertions of the defendant whether he had acted with good

faith or fraudulently. For however willing we may be to permit a single individual to pass on the question, debt or no debt, payment or no payment, discharged or not discharged, we have evinced an unwillingness to submit to such individual the power of deciding on the right of property of *meum* and *tuum*, to the amount of a single cent, or to say whether we have performed with good faith those personal obligations which we, by our contracts, have assumed. If it be admitted that the justice has jurisdiction over this case, he must of necessity have power of examining every question which would form a defence, and it must be extended to all bailments, for it would be difficult to confine it by the legislature to such cases where the defence was simple, as probably it was in this case; but the most complicated must also be included; no line can be drawn. A justice of the peace would have to decide upon the quantity of diligence which will protect, or the quantity of negligence which will charge bailees of all descriptions, from the bearer for reward, to the carrier who receives no reward. I repeat it, we are and have been unwilling to permit any one man to say to us, you have been negligent, you have been fraudulent, you ought to have resisted the robber, you were more careless of the rights of others than of your own. All these questions might have arisen in this case, for he was (187) not bound to deliver the iron at all hazards, and the justice had not the right of passing on his justification or excuses, whatever they may have been. For these reasons I think that the expression in the act, *for specific articles, whether due by obligation, note or assumpsit, do not embrace this case*; and this want of jurisdiction appears upon the indictment; for unless it was a promise to restore to the plaintiff his own iron, the question whether the iron had been worked upon the plaintiff's wagon could not be material, that is, it would have offered no defence. I, therefore, think that the judgment should be arrested.

Judge HALL assenting,

Judgment reversed.

STATE v. YEATES.

STATE v. YEATES.

From Wilkes.

Under the act of 1816, *ch.* 20, corporal punishment and imprisonment cannot both be inflicted on a person found guilty of manslaughter.

Indictment for the murder of a slave, tried before NASH, Judge. The jury found the prisoner guilty of manslaughter, and the Court sentenced him to be imprisoned eleven calendar months, and to receive at two several times thirty nine lashes. The prisoner, by his counsel, objected to that part of the sentence which imposed whipping; the objection was overruled, and the prisoner appealed.

The *Attorney General* argued the cause on behalf of the state.

TAYLOR, Chief Justice.—This case calls upon the Court, for the second time, for a construction of the act of 1816, *ch.* 918, which abolishes the punishment of burning in the hand in clerigiable felonies. The nature of this (188) appeal has rendered it indispensable that the former opinion should be carefully reviewed and reconsidered; and I have done so, under a perfect disposition to pronounce the result of my present conviction, uninfluenced by any former opinion on the question.

It may be readily conceded, that a literal construction of the words of the act will justify the infliction of whipping on a conviction of manslaughter; but is the Court bound to give a literal construction of a statute, when they are thoroughly convinced that, in doing so, they will contravene the intention of the legislature? The answer may be made in the language of the law, that a statute should be so construed as will best answer the intent the legislature had in view; and this intention is sometimes to be collected from the cause or necessity of making the statute, and, sometimes, from other circumstances. This intention, whenever it can be discovered, ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter of the statute. A thing which is within the intention of the maker of a statute, is as much within the

statute, as if it were within the letter; and a thing which is within the letter of a statute, is not within the statute, unless it be within the intention of the makers. (*Bac. Abr. tit. Statutes.*) The latter rule applies forcibly to the cases where the Court is required to pronounce a punishment as incurred by a crime, which they do not think the legislature intended to annex to it.

If it should be inquired, as it naturally will, why the persuasion should be so thorough, that the legislature did not intend that the crime of manslaughter should be punished by whipping, the answer is, that from the early period of our law, when a distinction was established between murder and manslaughter, by the introduction of the benefit of clergy, the latter offence, though felonious, has been considered as flowing from the frailty incident to human nature. It is the result of a temporary suspension (189) of the reason, induced by a provocation which the law deems legal. No disgrace, or opprobrium, ever has been, or is now, attached to the character of the man who commits it. The law has, in its policy, always denounced against the forfeiture of his goods as a punishment, because the violent death of a human being, however produced, was too serious a thing to be passed over without animadversion. But the burning in the hand, so far from being a punishment, restored the party to credit and capacity. He ceased to be a felon, and was restored to all his legal rights and privileges; he was purged from his guilt by the privilege of clergy, which operated as a statute pardon.

To the other clergiable felonies, there was an original infamy attached, from which, however the statute pardon might restore the party to his legal rights, his character could not be cleansed.

A convicted thief, although pardoned and admissible as a juror or witness, has irrecoverably lost his *caste* in society.

As a punishment, burning in the hand was too slight; but whipping, though it could give no additional infamy to the crime, might deter others from the commission of it.

There was, too, an evident absurdity in whipping for a larceny, where the thing stolen was under the value of a

shilling, and burning in the hand, where it was over that value. This was removed by the act, which punished both crimes by the same measure.

In the case of manslaughter, however, the benefit of clergy restored the party to his legal right, and, in so doing, its operation was full and complete; for no crime had been committed, which affected his moral estimation.

“We now consider,” says *Justice Foster*, “the benefit of clergy, as a relaxation of the rigor of the law, a condescension to the infirmities of the human frame. And therefore, in the case of all clergiable felonies, we now measure the degree of punishment by the real enormity of the offence; not as the ignorance and superstitution of former times suggested, by a senseless dream of sacred persons on sacred functions.”

It appears to me, that in legislating on this subject, the first object was to get rid of the disgracing practice of burning in the hand; because the reason of its introduction had altogether ceased, which was to distinguish laymen from priests, that the former might not claim clergy a second time; and because it was too slight a punishment in larceny, and too disgraceful a one in manslaughter. That the words, “moderate pecuniary fine,” used in the act, were intended to apply to manslaughter; the “one or more whippings,” were applicable to larcenies; and “in the discretion of the Court, under the circumstances of the case,” import a legal discretion, to be exercised with a view to the maxims, rules, and principles of criminal jurisprudence, and the moral sense and habitudes of the citizens.

It is mentioned by writers on the criminal law, as one of the glories of the system, that the species, though not always the quantity or degree of punishment, is *ascertained* for every offence, and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment which the law has, beforehand, ordained for every citizen alike, without respect of persons. For if judgment were to be the private opinions of the judge, men would then be slaves to their magistrates, and would live in society without knowing exactly the conditions and obligations which it lays them under. (4 *Bl.*, 317.)

The construction contended for on behalf of the state,

would add a new principle to the criminal jurisprudence of the country, which is without example in its history. For there is no instance of a judge being invested with a discretionary power to consign a man to infamy by the nature of the punishment, unless there is something infamous or mean in the crime itself.

When the jury has convicted a person of manslaughter (191), the Court is bound to understand it in the sense of the law, as "the unlawful killing another without malice express or implied;" and is bound to apply that punishment which the law adapts to a crime, which arises from the sudden heat of the passions, and not from the wickedness of the heart.

The Court cannot aggravate the punishment from a belief that the jury have mistaken the case, and ought to have found it murder; for that would be to usurp their constitutional functions. I have no fear that the Judges of this land would not exercise this discretion with as much discrimination and lenity, as any others in the world, but I think it an unsafe rule to confer such a power, by force of a construction, which would introduce an anomaly into the criminal law, which the legislature did not seem to intend. The following sentiments of a great Judge on this subject are worthy of being remembered: "The discretion of a Judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice: in the worst, it is every vice, folly and passion to which human nature is liable."—*Ld. Camden*.

It may be thought, from the similarity of some expressions in this act with those of the 19 *Geo.*, 3, that the latter was before the framer of the act, and that manslaughter, which is expressly excepted from the punishment of whipping by the British statute, is omitted in our act, in order that it might be subject to it. This is possible; but I think it more probable that the exception was omitted through mistake or inadvertence, and that the legislature could not have passed it in its present shape, if they had believed it would have borne the construction now contended for.

There have been six sessions of the legislature since the decision in the case of the *State v. Kearney*, applying to

the act of 1816 the construction which is still adhered to; and it is a very reasonable presumption that the members of the successive legislatures were apprised of the determination. Their silence on the subject is a strong reason for believing that they did not disapprove the construction adopted by the Court; because, upon several other occasions, they have passed laws in consequence of decisions made in this Court. My opinion is, that the judgment, so far as it sentences the defendant to be whipped, should be reversed, and affirmed as to the residue.

Judge HENDERSON concurred with the CHIEF JUSTICE in opinion.

HALL, Judge, differed, and assigned his reasons as follows:

In the case of the *State v. Kearney* (8 N. C., 53), I think the rules of construction were stretched too far. I am still of the opinion that the law would be more wholesome, and founded in better policy, if it was as that case declares it to be, and did not embrace the case of manslaughter, and for the reasons given by the Court in delivering their opinion in that case; and in a matter of legislation, I would continue to be governed by those reasons; but as an expounder of the law, I confess I think the act of 1816, *New Rev., ch. 918*, is broad enough to include the case of manslaughter, and that there is no room left for construction.

It is very true, that in the case of *State v. Kearney*, the judgment pronounced by the Superior Court was erroneous, because both fine and whipping were ordered, and on that account could not and ought not to have stood; but I do not shelter myself under that part of the case. It seemed to me then, that the opinion given on the act of assembly was correct. I have thought much on the subject since, and from the best consideration I have been able to give it, I feel myself under the necessity of retracting.

I observe that a similar law passed the British (193) parliament in the 19 *Geo.*, 3, *ch. 74*. In that law manslaughter is excepted. The Court may impose a fine, but cannot order whipping to be inflicted. However desirable it is, that a similar exception had been made in

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our law, as the legislature have not thought proper to make it, I think the Court would transcend their limits to make it by construction. For these reasons, I think judgment should be entered for the state.

By a majority of the Court,

Judgment reversed.

STATE v. TWITTY.

From Lincoln.

The Governor cannot, constitutionally, add to or commute a punishment; but under the power of pardoning, he may remit part of a fine.

The defendant had been convicted of forgery, and appealed to this Court, where the judgment below was affirmed. The sentence of the Court was the pillory, three years imprisonment, thirty-nine lashes, and a fine of \$1,000. Execution issued for the fine and costs, and the sheriff levied on property sufficient to satisfy them; afterwards a *ven. ex.* issued, on which the sheriff returned, that he had sold the property, satisfied other executions from Mecklenburg, and had satisfied one half of the above fine of \$1,000, the residue having been remitted by Governor Holmes, and that by direction of Mr. Solicitor Wilson, he still retained in his hands the remaining \$500.

At October term, 1825, before NASH, Judge, the defendant was, on motion of Mr. Wilson, ordered to show cause wherefore execution should not issue for the remaining \$500; and on argument the rule was discharged; whereupon the solicitor appealed, on the ground that (194) by the constitution and laws of North Carolina, Governor Holmes was not vested with the power which he had exercised.

The transcript of the case sent up, did not contain a copy of the instrument signed by Gov. Holmes.

The case was submitted without argument.

TAYLOR, Chief Justice, delivered the Court's opinion.

The power of pardoning is confided to the Governor, by the constitution, in very general terms, and restricted only to those cases where the general assembly shall carry

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on the prosecution, or the law shall otherwise direct. This case does not come within either of the exceptions; and as the Governor might have granted a pardon as the whole of the punishment, why may he not do so as to part? Though he cannot add to or commute a punishment, it is consistent with the spirit of this authority, and clearly within its words, that he should remit part of a fine. There seems to be no ground for doubting; and the judgment must be affirmed.

Judgment affirmed.

STATE v. JUSTICES OF LENOIR COUNTY.

From Lenoir.

The Justices of a County Court are not obliged, by their own exertions, to build and repair jails; they are only bound to use such means for the accomplishment of that end as the law prescribes—*i. e.*, to lay a tax, appoint commissioners to contract, a treasurer of public buildings, &c.; and for an omission of one or all these acts, *it seems*, they may be indicted jointly as a body: but the indictment must charge which of the duties prescribed by the act has been neglected: it is not sufficient to charge generally that they negligently and unlawfully did permit the jail to go to ruin and decay.

The question in this case arose upon the indictment which was in these words, *viz.*:

The Jurors for the state upon their oath present, that within the (195) county of Lenoir there now is, and from time immemorial there hath been, a certain common jail, for the purpose of keeping in safe custody offenders and prisoners within the same, situate and being in the county of Lenoir, known by the name of the jail of Lenoir; and that on the first day of January, in the year of our Lord one thousand eight hundred and twenty-five, and continually from thence, until the day of taking this inquisition, the said jail hath been and still is greatly ruinous, in decay, and out of repair, for want of needful and necessary repairing and amending the same, so that offenders and prisoners, during such time, could not, nor can they now, be kept and secured in safe and secure custody within the said jail, as they ought, and were wont to be, and still ought to be, to the great hindrance and obstruction of justice; and that (naming the justices) justices of the peace for the county of Lenoir, whose duty it is to amend and repair the same, when and so often as it shall be necessary, have failed so to do; but negligently and unlawfully did permit the said jail to go to ruin and decay, contrary to the act of the general assembly in such case made and provided, and against the peace and dignity of the state.

To this indictment defendants demurred, and the de-

murrer having been sustained below, *Mr. Solicitor Miller*, for the state, appealed.

Attorney General, for the prosecution.

Gaston, contra.

TAYLOR, Chief Justice.—There are some rules relative to indictments, which it is indispensable to observe, notwithstanding the relaxation in point of form which is introduced by the act of 1811. The indictment must still contain a description of the crime, and a statement of the facts by which it is formed, so as to identify the accusation; otherwise the grand jury might find a bill for one offence, and the defendant be put on his trial in chief for another.

The defendant ought, also, to know what crime he is called upon to answer, and the jury should appear to be warranted in their conclusion of “guilty or not guilty” upon the premises to be delivered to them. The Court should, also, be enabled to see on the record such a specific crime, that they may apply the punishment (196) which the law prescribes; and the defendant should be protected by the conviction, or acquittal, from any future prosecution.

These are elementary rules, which must be substantially observed.

In ascertaining the duties imposed upon the justices in relation to jails, we find that the act of 1795, *ch.* 433, gives them power and authority to lay and collect taxes, from year to year as long as may be necessary, for the purpose of building, repairing, and furnishing their several court-houses and jails, in such a manner as they shall think proper.

The other act of 1816, *ch.* 911, converts this authority into a positive duty, and directs that the justices shall, from time to time, lay a sufficient tax to erect and keep in good repair, the public jail, court-house and stocks, in their respective counties. Without deciding whether the neglect of this duty is an indictable offence, it is obvious that the justices are not called upon to answer that charge, but one altogether distinct, viz., “negligently and unlawfully permitting the jail to go to ruin and decay.”

There is no act which makes it the duty of the justices

to repair the jail; and its going to ruin and decay, may be the consequence of their neglecting the duty which is assigned, but the offence producing that consequence should be positively stated. Against the charge, if stated in the terms of the act, they might have a defence, which they could not adduce in the present shape of the accusation; nor do I see how a conviction or acquittal on this indictment would protect them against a future prosecution for not laying the tax (supposing it to be indictable). The case of overseers of the road is very different from this; for the act makes it their positive duty to keep the roads in repair; a neglect in this point constitutes the indictable crime, and not the neglect of the preparatory steps, to which various penalties are annexed. For these reasons, without examining any other point that was made, I think the demurrer must be sustained.

HENDERSON, Judge.—The form of this indictment (197) is evidently taken from the English precedents of indictments against the county for not keeping in repair the roads and bridges within their county, and I agree with the counsel for the defendants, that there is no analogy in the cases. Of common right, in England, the county is bound to keep all public roads and bridges in repair; they can protect themselves from the burthen only by throwing it on some other person. The *corpus delicti* is the permitting the road or bridge to be out of repair. The law will admit of no such defence as here, the employment of all the means in their power, an ineffectual attempt to repair; it presupposes an ability, and concludes that these defences are false in point of fact. The justices of our County Court are not obliged, by their own exertions, to build and repair jails; they are only to use the means to that end which the law has placed in their power; they are to lay the tax, make the order, appoint a treasurer of public buildings, appoint commissioners to contract for the building of the jail. An omission to perform one or all those acts, when necessary, is a violation of their duty, and they being of public concern, such omission is indictable. But the indictment must be conformable to the fact, it must charge which of these duties was omitted; for if this indictment were good, they might have made the order for repairing the

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jail, appointed the treasurer of public buildings, laid the tax for that purpose, and appointed commissioners to contract, and in every respect done their duty, and yet the indictment be true, that is, the jail out of repair on account of a failure somewhere beyond the control of the justices, and when they are actually endeavoring to punish the individual who failed to do his duty and to rectify the injury which he had done. I repeat it again, they are not by law bound to build or repair jails, but to take specific measures to that end. Their liability arises not from the thing being undone, as here observed, but (198) in not taking those measures which the law has instructed them to take. I have no hesitation in saying, that for this they are indictable, and without the least corruption, for in these cases they act not in their judicial characters, but as police officers; and that they may be indicted jointly, or rather as a body; for it is for the omission as a body that they have offended; the omission of the one is not the omission of the other; they are not responsible for the acts of each other; but the body as a body is liable for its own acts. Any individual member may justify, or rather defend himself, as an individual, and escape individual punishment, by showing that he endeavored to cause the body to do its duty. The demurrer should be sustained.

HALL, Judge, assenting,

Judgment affirmed.

Approved. S. v. *Comm'rs*, 15 N. C., 345; S. v. *R. R.*, 44 N. C., 234; S. v. *Comm'rs*, 48 N. C., 399; *Kensey v. Magistrates*, 53 N. C., 186; *White v. Comm'rs*, 90 N. C., 437.

STATE v. SAUNDERS.

From Johnston.

Under the act of 1823 for the promotion of agriculture, the clerk proceeded against for not making a return, may make his excuse to the Judge of the Superior Court, and on the sufficiency of the excuse the Judge of the Superior Court will decide in his discretion. This Court will not revise the exercise of such discretionary power.

This was a proceeding which commenced by *scire facias*

issuing under the acts of 1823, to promote agriculture, &c., against the defendant, as former clerk of Johnston County Court, to show cause wherefore judgment should not be entered against him for the sum of \$1,000, for his failure to make return on oath of all monies in his hands as clerk, pursuant to the act.

The matter was heard below, before DONNELL, Judge, when the defendant offered as an excuse for his failure the facts set forth in an affidavit which he made. The substance of the affidavit was, that defendant was appointed (199) clerk of Johnston County Court in Nov., 1786, and held the office until February, 1818; that in the year 1810, he appointed a deputy, who from that time took the entire management of the office in the receipt and payment of all monies therein; that prior to the appointment of his deputy, when he bestowed his personal attention to his office, there was no law requiring him to keep a statement of monies received from, or paid to, individuals, and that he kept none such; and during the time that he performed the duties of clerk by deputy, he could not procure such statement but by his *personal* attention to the business, and his deputy would then have been useless; that his deputy died in 1823, and therefore his aid in making such statement was lost; that defendant had been advised that he was not subject to the operation of the law of 1823, because he was not a clerk when it was enacted, having resigned in 1818, and the duty required by it was not imposed by any law while he was in office; but that notwithstanding, he had endeavored to make such a statement as the law required; this, however, from the lapse of time, the defect of memory, and certain data on which to proceed, he found it impossible; and he quit, in despair of being ever able to make a statement to which he could swear with confidence; that he will not swear there is *nothing* in his hands, but he solemnly declares that he doth not know, nor has he the least recollection of any monies being due from him as clerk.

The presiding Judge deeming the excuse sufficient, refused to grant the motion of the Attorney General for judgment for the forfeiture, whereupon the Attorney General, in behalf of the state, appealed.

Attorney General, for the state.

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Badger, contra.

HENDERSON, Judge, delivered the opinion of himself and brethren, and said:

This is a proceeding against the defendant, late (200) clerk of Johnston County Court, under the act of 1823, for failing to make a return of all monies that had come to his hands by virtue of his office, and which had been uncalled for for the space of three years. The penalty of one thousand dollars attached upon the defendant for not making his return before the first Johnston Court after the first Monday in August. But the Judge of the Superior Court, before whom process is directed to be commenced to enforce the forfeiture, has the power to excuse him for failing to do so. In this case, the Judge excused the defendant, from which it followed, that the penalty did not attach. There was then nothing on which the proceedings could stand, and the judgment for the defendant followed as a matter of course. We have no right to supervise this discretion of the Judge. This has been repeatedly decided in this Court. Whether this judgment will form a peremptory bar or not, will depend on the construction of the act of 1823; for if the Judge has not the power of entirely discharging him from his accountability, the judgment passed by him will not affect it.

We can *see* no error in the judgment; it must be affirmed.

Judgment affirmed.

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From Craven.

An alien is not entitled to a jury *de medietate linguæ*, in North Carolina.

This was an indictment for murder, tried below before NORWOOD, Judge. The prisoner, upon his arraignment, pleaded not guilty, and suggested to the Court that he was an alien, and prayed that he might have a jury *de medietate linguæ*; it was admitted on the part of the state that the prisoner was an alien. The Court overruled the motion for a jury *medietate*, and the prisoner was convicted, and sentenced to death.

The prisoner moved, before judgment, to set aside (201) the verdict, and have a new *venire* because of the denial of his prayer for a jury *de medietate*, which being refused, and judgment pronounced, the prisoner appealed.

Gaston, for the prisoner, contended, that the stat., 28 *Ed.*, 8, *ch.* 13, giving a jury *de medietate* in England, and yet in force there, was unquestionably the law which our ancestors brought with them. That it was, before the revolution, the law of North-Carolina; for it was not "in-compatible with our way of living and trade." Act of 1715, *ch.* 5. See also the act of 1746, *ch.* 2, § 23, §13.

It has been allowed also in several of the states; in New York (2 *Johns. Rep.*, 381), and in Pennsylvania (1 *Dallas*, 73), and seems to have been used in the colonies of Maryland, Virginia, and South-Carolina. (*Mr. Gaston* here read letters from professional gentlemen of the before named states, on the subject of allowing a jury *de medietate* in those states.)

The bill of rights of North-Carolina declares, that "no freeman shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open Court, as heretofore used." And the act of 1778, *ch.* 133, *N. Rev.*, re-enacts, "all such statutes as were heretofore in force and use within this territory, which are not repugnant to, or inconsistent with, our political institutions and form of government."

The act of 1779, directing the mode of procuring juries in this state, cannot be construed to repeal, for the instructions there given can only be viewed as *directory*, and are subsidiary to the well known and established principles, and the general statutes in England prescribing the qualification of jurors have not been held to take away, by implication, the right to a jury *de medietate*. Then why should they here? The general regulations in Pennsylvania, also, are as strong as ours, and yet the right is there allowed.

In 1793, it was decided at Wilmington (as I have (202) heard) by the highest judicial authority known to the country at that time, that an alien was entitled to a jury *de medietate*.

HENDERSON.—Judge *Williams* informed me, that he al-

lowed it at a Court of Oyer and Terminer held at Wilmington many years ago for the trial of some prisoners who were aliens and natives of France.

Gaston.—It seems, then, to have been considered the law; the legislature has not since altered it.

In 1817, the legislature appointed commissioners to enumerate and specify the British statutes in force in North-Carolina, and they have declared this of 28 *Ed.*, 3, to be one. (1 *New Rev.*, 88.) In 1819, the legislature adopted their report, and ordered copies to be delivered to the Courts for their guidance: six years have since elapsed and the legislature have not seen fit in any way to alter it.

The *Attorney General*, for the state.—Upon an examination of the subject, it will be found to be at least a questionable point whether, even in England, at the present day, a jury *de medietate* would be allowed. (3 *Bl.*, 361.) But be that as it may, it ought clearly to be shown that such a jury was allowed, or in use here, when our act of 1778 was passed. It should be shown that while we were colonies it was the law and practice of North-Carolina.

The true inquiry here is this, have our acts regulating juries as to qualification, &c., operated a repeal of the stat. of *Ed.*, 3. According to the rules laid down for the construction of statutes (*Bac. Ab.* “*Statute*” *G.*, 11 *Co.*, 63), it would seem to me that the directions given by our law for obtaining juries, and suited to the construction of our Courts, must operate a repeal of all other modes (supposing their previous existence to be undoubted) which were inconsistent with the constitution of our Courts.

If this be true, it will follow that an alien cannot (203) claim a jury *de medietate*: for it does not seem to have been in the contemplation of our legislature to permit a Superior Court to issue a *venire* in any case, or under any circumstances; and the power given to the Court to direct the sheriff to summon in certain cases *tales de circumstantibus*, plainly shows that it has no general power to have a jury summoned. Now, how does the motion for a jury *de medietate* operate? *Hawkins* says, as a challenge to the array, and that the Court must issue a new *venire* for the whole array; but, says our statute, the County Court alone shall issue a *venire*, for it alone can determine as to competency in point of freehold.

The sister states have been resorted to. I can only say, that the practice of statutes of the sister states cannot affect a matter on which (as I contend) we have legislated for ourselves. But it may be remarked, that in Pennsylvania the practice rests entirely on *usage*, and the Court will not examine the right there because of such usage. In South-Carolina, the act of assembly gives an alien the right; if, as has been contended for the prisoner, he had it by virtue of the stat. of *Ed.*, why should a law be made to give it again? As to the phrase "good and lawful men," in the bill of rights, it does not include *aliens*; they are not deemed such by the law.

Of the case at Wilmington I know nothing; but I apprehend it must either have been a conceded point by the prosecutor; or the Court, not having an opportunity of examining the point, felt unwilling to withhold from a prisoner a right which might possibly be his, more especially when the prosecuting officer made no objection. But however this may be, if circuit decisions are available, the point has more than once been ruled on the circuit against the alien's claim.

As to the report which has been made to the legislature by the commissioners, that the act of *Ed.*, 3, is here in force, it seems to me that it can be viewed as nothing (204) more than the opinions of professional gentlemen on the point. The legislature has done nothing, that I know of, to directly sanction or disapprove of the report. When, however, it means to give its sanction to such a compilation, it has commonly heretofore said so; its silence, therefore, on this occasion, would lead my mind to results different from those of the prisoner's counsel.

The Court differed in opinion, HALL and HENDERSON holding that the prisoner was not entitled to a jury *de medietate*, and the CHIEF JUSTICE that he was, and they delivered their respective opinions *seriatim*, as follows:

HALL, Judge.—The privilege extending to aliens the right to a jury *de medietate lingue* was granted by stat. 28 *Ed.*, 3, *ch.* 13, re-enacted by the 8th *Hen.*, 6, *ch.* 29. It is contended that those statutes are in force in this state, and that that privilege has been improperly withheld from the prisoner in this case. It is said that the act of 1715, *New Rev.*, *ch.* 5, enforces those statutes. That act de-

clares, that all statute laws of England, providing for the privileges of the people, limitations of actions, preventing vexatious law suits, immorality and fraud, confirming inheritances and titles to land, shall be in force. It is further argued, that the act of 1778, *New Rec.*, ch. 133, embraces them. That act declares, that all such statutes and such parts of the common law as were in force and use and are not destructive of or repugnant to the freedom and independence of this state, &c., and which have not been provided for, in whole or in part, &c., are declared to be in full force.

If those British statutes were in force before the revolution, I do not think the latter act of assembly excluded them; but I do not think they were in force by the first recited act. That act, as far as it relates to this question, enforces such as provided for the privileges of the people; the statutes in question provides for the privilege of aliens.

I admit, however, that many statutes of Great Britain had become the law of this state before the time of passing that act. When the state was first settled as a colony of Great Britain, the colonists brought with them, at their birth-right, the laws of the mother country, namely, such parts of the common law, and statutes that were incorporated with it, as were suitable to their situation at the time of their migration; such as the statute of 4 *Ed.*, 3, ch. 7, *e bonis asportatis in vita testatoris*, the statute of uses, and the statutes of *Eliz.* against fraudulent conveyances to defraud creditors, &c. And if the statutes we are now considering were suitable and proper for the government and well being of the colonists at that time, and were not afterwards repugnant to or inconsistent with the freedom and independence of the state and form of government therein established, I admit they are in force at this time. But it seems to me that those statutes were in their nature local; they were founded more in commercial policy than in general principles calculated to answer alone the ends of justice and reach the objects of criminal law. They both speak for themselves. The statute of *Hen.* 6, premises, that for want of such regulations "many merchant aliens have withdrawn, and daily do withdraw them, and eschew to come and be conversant on this side the sea, and likely it is that all the said

merchant aliens will depart out of the same realm of England if the said last statute be not more fully declared, and the said merchant aliens ruled, governed and demeaned in such inquests according to the first ordinance aforesaid; to the great diminishing of the king's subsidies, and grievous loss and damage of all his said realm of England; and our lord the king, willing therein to provide for the weal and profit of him and all his realm, and to eschew the damages and inconveniences which may easily happen in this behalf; and also to give the said merchant aliens the greatest courage and desire to come with their wares and merchandizes into this realm: by advice of the lords, &c., it is declared, &c." It will be kept in view that this (206) statute was re-enacting the statute of *Ed.* 3, which first gave the privilege to aliens, which statute it was supposed had been repealed by the statute of *Hen.* 5, in the preceding reign.

In the infancy of the settlement of this country, the habits of the colonists were agricultural; their trade and commerce were altogether in the hands of the mother country; a quite different policy prevailed from that which dictated the statutes of *Ed.* 3, and *Hen.* 6; and the question we have now to decide is, not whether such a law extending the privilege to aliens would be suitable to our *present* situation, as it seems many of the states have thought it would be, but whether it was suitable to our situation as an infant colony at that time; for if that was not the case, and on that account it was not adopted at that time, it was not the law at this day, for it has never been enforced by any positive law.

I therefore think, as the reasons which induced the parliament in England to enact those statutes, were not good reasons why they should be enforced by the colonists, as not being applicable to their then situation, the Court below gave a correct judgment in refusing the prisoner the jury he prayed for.

HENDERSON, Judge.—I concur in the opinion given by Judge HALL, and for the reasons given by him. The policy which induced the parliament of England to pass the statutes of *Edward* was to encourage foreign merchants, and possibly artists, to come and trade with and reside among them. This policy is not only declared in the act itself,

but in the act of *Henry* 6, complaining of the construction given to the act of *Henry* 5, respecting the qualifications of jurors. In the colonial system, the policy was certainly inverted. Foreign merchants were prohibited from trading with us; and artists were certainly not encouraged, for it was the policy of the mother country to supply the colonists with manufactures of her own production, (207) and to keep the colonists engaged in the cultivation of the earth, to grow the raw materials for the manufacturers of the mother country. As to those foreigners who were cultivators of the soil, and who might possibly have been invited to settle among us, as we find frequently bodies of Germans, Swiss, and French, settling among us, the moment they arrived here for that purpose they were considered as colonists, having no intention to return; and therefore, having no interests separate and distinct from other colonists, they lost their alien character. A few years residence here was required only to ascertain their character, and to show that their object was a permanent residence; and then they became entitled to all the rights and privileges of colonists from the mother country. Our ancestors, therefore, did not bring with them the statute of Edward. This law, I think, was territorial, and confined to England; it was unsuited to the situation of the colonists. If it was not brought with our ancestors, there is no act either of the colonial government, the mother country, or of our present government, which imposes it. The last act upon the subject enforces such acts of the British government as had been in force and use here, and were compatible with our form of government. If, therefore, it had not been in force before, that act did not enforce it. I am at a loss to declare the meaning of the words *in use*, as used in that act; I am now, and heretofore have been, much perplexed to ascertain its meaning; but I am satisfied that it produces no such effect, as enforcing the act in question. I would mention, also, the various acts of our legislature on the subject of the qualification and appointment of jurors, as affording some evidence, although, I admit, not conclusive that the law of *Edward* was not considered as being in force. I do not mean to say, that had the act of *Edward* been in force, that these provisions would repeal it, for I

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think that they might be made to stand together; but only as affording some evidence that the law was not in (208) use, and sufficiently strong to repeal the evidence of its being in use, arising from its having been used by Judge *Williams* once or perhaps twice at Wilmington; if such partial and solitary instances of its being in use would satisfy that word in the act of 1778.

I place no reliance on the report of the gentlemen on the subject who lately revised our statutes. That report was not either sanctioned by law or disapproved; it was simply ordered to be published. And if the question was dependant on its having a legislative sanction by such order of publication, I would say, that it was rather evidence that it had not. This subject was brought before the legislature by the report, and it was simply ordered that it should be published, without expressing any opinion thereon. It was saying, that it must depend on its own merits, we will neither give it our sanction or disapprobation.

I, therefore, concur with Judge HALL, that there should be judgment for the state.

TAYLOR, Chief Justice.—It is difficult, perhaps impossible, to arrive at exact demonstration on a subject that involves the question whether an ancient British statute, passed nearly five hundred years ago, is now in force in this state. There are no certain guides to direct us in an inquiry of this sort; for the darkness that hangs over the early legislation and judicial history of this state, the dearth even of traditional knowledge, has left us little to resort to but general principles and reasoning, and no confidence that more can be done than grouping together the strongest probabilities. It is a matter of the highest duty however, to make an honest effort to investigate the subject, in a case of such awful interest as the one before us, where, in all human probability, the life of a fellow being depends on our decision.

In order to ascertain whether the prisoner has been legally convicted, I shall consider two questions; 1st, (209) whether the statute of 28 *Ed.* 63, allowing to aliens a trial *de medietate lingue*, forms a portion of that statute law of Great Britain, which the first settlers of this state brought with them from the mother country; 2dly,

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if it does, then, whether it has been repealed, or superseded by any legislative act of our own.

It seems to be agreed by the writers on the subject, that colonists who settle a new and uninhabited country, carry with them the laws of the parent country as their birth-right, so far as such laws are applicable to their situation, and the condition of an infant colony; or in the language of an early act of assembly, the laws of England were, at the first migration of our ancestors, the laws of this province, "so far as they were compatible with our way of living and trade." (1715, *sec.* 1.)

The policy of the 28 *Ed.* 3, was to encourage foreigners, merchants and others, to resort to that country, under an assurance that justice should be impartially administered to them; and that such a liberal mode of trial should be practiced, in all controversies in which they were parties, as would prevent the operation of prejudice, and place them under no disadvantage, to be apprehended from their ignorance of the customs and manners of the people among whom they found themselves.

There is the highest evidence of the wisdom of this policy in relation to England; for when the statute of 2 *Henry* was afterwards enacted, that no person should pass on any inquest, unless he had lands and tenements to the yearly value of forty shillings, and a construction was put on this act which excluded aliens from the privilege of a trial *de medietate lingue*, the parliament interposed, and by the declaratory act of 8 *Hen.* 6, after reciting the mischiefs suffered from aliens leaving the kingdom in consequence of this construction, they declare, that the statute of *Hen.* 2 did not intend to change the mode of trial where an alien was a party; but was meant to prescribe the qualification of jurors, between denizen and denizen.

(210) The act expresses an anxiety to give to the said merchant aliens "the greatest courage and desire to come with their wares and merchandize into this realm."

As the wealth of the present state would increase with the prosperity of the colonies, any British statute having a tendency to promote the object, were applicable to the circumstances of the new settlers. Immense forests were to be cleared, lands to be reclaimed and cultivated, and various labors to be performed, to which capital, enterprise

and industry, were essential; and these were likely to be drawn from other sources besides the parent state, in the degree which foreigners could be assured that they would enjoy a certainty of legal protection.

The statute of 28 *Ed.* may have been supposed to have been a mere commercial regulation, from the words of 8 *Hen.* 6, "merchant alien;" but the act itself says "merchants and *others.*" It is true that more of the trading profession of persons resorted to England at that period, than others, yet no distinction was made between them and other classes of aliens; and all were equally entitled to the privilege.

The mechanic arts, and the sciences, were then struggling into a feeble existence; and of course few foreigners could bring any improvements, or discoveries, into a country where they received their first and strongest impulse. But in after ages, it became the interest of Great Britain to introduce foreigners from states which rivalled or exceeded them in many of their manufactures; and it was equally important that this mode of trial should be allowed to all descriptions, as the means of extending their commerce through their manufactures, and of enriching their country by the diffusion of useful knowledge. But at the present day, aliens are to be found in every state; some, impelled to leave their native country by religious proscription, or political intolerance; many inspired with the hope of improving their fortunes, or being relieved from the (211) anxiety of providing for their posterity, by the new and ever improving prospects opened to mankind by the salutary influences of a perfectly free government. All, however, bring with them, in a greater or less degree, the arts and industry that multiply the resources of man, or discoveries in science that give strength to his character, or embellishment to his existence.

But recurring to the early history of our own state, it may be thought, that the system of commercial monopoly established by the navigation act, and which, probably, went into full operation about the time the first permanent settlements were made here, would prevent the access of foreign merchants, and thus render useless and inapplicable the mode of trial now in discussion. That the colonial system would, in a very great degree, prevent an inter-

course with merchant aliens, must be admitted; but it is evident, that the policy of that system was best promoted by giving encouragement to foreign agriculturalists, and others, who would add to those productions of the soil which were exported to the mother country. The most advantageous employment of any capital to the country to which it belongs, is that which maintains there the greatest quantity of productive labor, and increases, in the greatest degree, the annual produce of the labor and land of that country. All the surplus produce of the colonies, which consisted in what were called enumerated commodities, could only be sent to England; and other countries must afterwards buy them of her.*

The policy of encouraging foreign settlers was invariably pursued by the mother country, particularly as these *then* colonies. By this she was a great gainer, without any diminution of her own inhabitants. In Pennsylvania, upwards of four thousand Germans were imported in the year 1750.† The French Protestant refugees fled to Carolina in great numbers, from and after the revocation of (212) the edict of *Nantz* in 1685,‡ which was before the division of the colony into North and South Carolina. Many years before the revolution, a considerable body of Palatines§ migrated hither, and settled upon lands of which many of their descendants are, at this day, respectable cultivators. Swedes and Dutch from N. York, French from the line of posts on our frontiers, and Spanish from our Southern borders at St. Augustine, must have found their way to this state, and, in the vicissitudes of human affairs, required the advantage of this mode of trial.

The colonies (says an elegant historian¶) which now form the U. States, may be considered as Europe transplanted. Ireland, England, Scotland, France, Germany, Holland, Switzerland, Sweden, Poland, and Italy, furnished the original stock of the present population, and are supposed to have contributed to it in the order they are enumerated.

But this position may be farther maintained by authority of the British parliament; for by the act of 13 *Geo. 2*, for-

* Smith Wealth of Nations. † 2 Settlements in America, 201. ‡ 1 Ramsay's Hist. U. States. § 1709, Williamson's Hist. N. Carolina. ¶ Ramsay's Hist. of the U. States.

eigners residing seven years in the American colonies were naturalized; and by 2 *Geo.* 2, foreign protestants, serving in royal American regiments for two years, were naturalized. Still these foreigners might require the allowance of this mode of trial, until their right to naturalization was complete by the prescribed term of residence; and I think it probable, that the demands and necessity of it, would be not less frequent here than in England, in proportion to the difference of population.

For it is a well known fact in the history of the national manners, that the mass of population of the two rival nations, England and France, were formerly nurtured in inveterate prejudices against each other; and we cannot suppose that the minds of our ancestors were purified from the taint of the parent hive by a transatlantic voyage.

(213) It may well be believed, that a Frenchman, tried for his life in N. Carolina, before the revolution, would as earnestly invoke the protection of the stat. of 28 *Ed.* 3, as if he were tried in England; and when we look at the habits and rank in life of the early settlers, who were to form his jury, would stand in equal need of it. "For a long time it was but ill inhabited, and by an indigent and disorderly people, who had but little property and hardly any law or government to protect them in what they had."* Happily, these prejudices are now no more than matters of history; they have been dispelled by the lights of knowledge and the genius of our institutions. But though an alien of any description, has at this day nothing to fear from the operation of malignant passions, he might labor under many disadvantages, from our ignorance of his language and the customs of his nation. If these may be obviated by allowing him a portion of his countrymen, or foreigners, upon his jury, in case of life or death; if by these means he will be better enabled to bring forward his defence to the consideration of the Court and jury; and if there is no positive law directing us, in plain and intelligible language, to disallow the claim, it appears to me safer to follow in the footsteps of our forefathers.

In a case of this importance, I cannot overlook what has been the practice of our predecessors, men who belonged to the profession before the revolution, and may be sup-

* Settlement in America, 256.

posed to have practical knowledge of what was then the course of criminal trials. These venerable persons formed a sort of connecting link between the present age and the past; and, as they have always allowed the claim of a jury *de medietate lingue*, whenever it was demanded, it is reasonable to suppose that such was the custom before their time.

The statute in question, though seldom called into action, appears to me, from these several views of the (214) subject, to have been in the number of those which our ancestors brought with them; not less so than many others which influence our daily transactions, and to doubt the existence of which would throw rights and property into the utmost confusion.

2. No inconsiderable light is reflected on this question by what has been already mentioned relative to the stat. of *Hen. 5*, for that made a general law for the qualification of all jurors, in terms as comprehensive as any of our acts of assembly; yet the parliament afterwards declared that they were not, and did not intend, legislating upon the special case of a jury *de medietate lingue*.

Farther, the statute of 27 *Eliz.*, *ch. 6*, requires the jurors to have an estate of freehold of the yearly value of 4*l.* The words are, "that in all cases where any jurors are to be returned;" yet it was held, that this statute did not extend to this mode of trial. (*Cro Eliz.*, 84.)

To ascertain whether a later statute repeals a former one it is necessary to inquire whether the later statute is couched in negative terms, or whether its matter is so clearly repugnant that it necessarily implies a negative. None of the acts on this subject relate to any cases, but those between the state and citizen, or between citizens. When they prescribe or alter the qualifications of jurors, the acts must be supposed to speak with a retrospect to those cases where *some* qualification in point of property was necessary to a juror, and not to those cases where no such qualification ever had been required.

A freehold qualification of some sort, was always necessary to a juror by the common law (*Litt. sec. C. 464*; *C. Litt. 157 a*), and it would seem to do violence to the intent of the legislature, to construe acts making provision for general and ordinary cases, as repealing laws made for

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peculiar cases and wholly of an anomalous character, most probably not within their contemplation at the time. The course of judicial exposition fortifies this idea; for by the 32 *Hen.* 8, inhabitants of corporate towns, worth 40*s.* in goods, may try felonies in sessions and jail deliveries (215) for such towns, and this is not repealed by subsequent acts concerning jurors. There is nothing, in any of our acts, which prevents them from being carried into complete execution, in perfect harmony with the law relative to aliens. Nor do I perceive that the force of this general reasoning is impaired by the statute of 5 *W. & M.* having introduced an exception of this mode of trial, in an act prescribing the qualifications of jurors. This was done from abundant caution, and to avoid the danger of misconstruction which had formerly arisen under the statute of *Hen.* 5. But, doubtless, without this exception, the courts would have made a like exposition, according to the cases before cited. I am therefore of opinion, that the prisoner is entitled to a new trial.

By a majority of the Court,

Judgment affirmed.

IN EQUITY.

TAYLOR, executor, *v.* LUCAS and others.

From Chatham.

As to personal property, a residuary clause not only carries all not disposed of, but every thing that in the event turns out not to be disposed of.

But one question was presented in this case, viz., whether a legacy left to a legatee, which lapsed by his death in the lifetime of the testator, should be divided among his next of kin, or should belong to the widow, who was residuary legatee.

PER CURIAM, after stating the question.—No rule is better established as to personal estate, though it is otherwise as to real, than that a residuary clause carries not only

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every thing not disposed of, but every thing that in (216) the event turns out not to be disposed of, as by lapse and the other means specified in the cases. (1 *Ves. Jun.*, 109, 110. *Ambler*, 138. 8 *Ves. Jun.*, 25. 4 *Ibid*, 732. 15 *Ibid*, 509.) The law raises a presumption in favor of the residuary legatee against every one except the particular legatee. The testator is supposed to deprive the residuary legatee only for the sake of the particular; and the bounty to him being prevented by death, the residuary legatee is preferred to the next of kin.

Approved. Jones v. Perry, 38 N. C., 206; *Mabry v. Stafford*, 88 N. C., 662.

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From Bertie.

The act giving power to Courts of Equity to order sales of real estate for the purpose of partition, directs the proceeds to which infants are entitled, to be secured to such infant or his *real* representatives. Hence such share of the proceeds is to be considered as real estate, and (if the infant die before arriving at age) the heir at law will succeed to it, and not the personal representative. But if the infant arrive at full age and then die, whether the heir at law will be entitled, *quere?*

The bill set forth, that the mother of Mrs. *Heckstall* had died intestate (leaving surviving her her second husband, *Samuel Powell*) seised and possessed of certain land in Bertie county; that her heirs at law were Mrs. *Heckstall*, the child of her first marriage, and *John Powell* and *Miles Powell*, children of her second marriage; that afterwards *Samuel Powell* died; when a bill was filed in equity by Mrs. *Heckstall* and *John* and *Miles Powell*, to sell the land of their mother for the purpose of division; that a sale was decreed, which took place, and was afterwards confirmed by the Court; that at the time of the sale and final decree, *John* and *Miles Powell* were infants, and the defendant was appointed their guardian, and as such received two-thirds of the purchase money of the land aforesaid; that *John* and *Miles* were (217) since both dead, without issue, leaving Mrs. *Heckstall* their heir at law, who claimed by the bill the two-thirds of the money arising from the sale of the land.

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The bill farther charged, that *John* and *Miles* left a large personal estate, and the complainant, *William Heckstall*, as their administrator, claimed the same.

The answer of *Powell* admitted, that as guardian he had received two-thirds of the price of the land; and as to the other property which it was alleged had belonged to his wards, he referred to his accounts as guardian, making them part of his answer, whereby it appeared that the estates of *John* and *Miles* were indebted to him.

The answer also stated, that *John* died first, and then *Miles*, after the defendant had received the purchase money of the land, and that *Miles* left, at his death, besides Mrs. *Heckstall*, two other sisters, *Nancy* and *Patsy*, on the father's side, who are equally entitled with Mrs. *Heckstall*, and are not parties to the bill.

The matters of account were referred, in the Court below, to the master, and on his report, DANIEL, Judge, below, decreed, that the complainants should receive of defendant two-thirds of the amount for which the land sold, it being considered by the Court as land; and that the defendant should retain the interest made on the money, as profits of the land, in part payment of his claim for advancements made to *John* and *Miles* as their guardian, and that each party pay his own costs.

From this decree defendant appealed.

L. Martin, for complainants.—By the act of 1812, ch. 847, which authorizes Courts of Equity to sell real estate to make partition, it is required in all cases, that when any of the parties be an infant, *feme covert*, or *non compos mentis*, imprisoned, or beyond the limits of this state, that “it shall be the duty of the Court to direct the part of the proceeds of the sale to which such person is entitled, to be so invested or settled, that the same shall be effectually (218) secured unto the person so entitled, or his or her *real* representatives.

The act of 1818, *ch.* 982, *sec.* 1, directs the appropriation of the money to be made in the same manner, as far as respects this case, when the land is sold for public purposes.

Although the defendant sets up an account in this case against his wards, it makes no difference; because the fund

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being real estate, he cannot hold it from the heirs; and because *Heckstall*, the complainant, is the administrator of both the wards, and avers that he has assets to more than the amount due the defendant, which is not denied.

TAYLOR, Chief Justice, delivered the opinion of the Court.

According to the directions of the act relative to the sale of lands for the sake of partition, the proceeds of an infant's share shall be so invested, or settled, that the same shall be effectually secured unto the person so entitled, or his or her real representative. (1812, *ch.* 847.)

If *John* and *Miles Powell* had died intestate before the sale, *Elizabeth*, the plaintiff's wife, would have been their heir at law, in exclusion of their paternal half sisters, conformably to the fourth rule of descent established by the act of 1808. It is equally clear, that if either had died under age, after the sale, the money produced by the sale must have been considered as land, and therefore the heir at law would have succeeded to it. But it is not so certain, that if one or both had arrived at full age, and then died, that his or their share of the money would then have been considered as land, and be descendible accordingly. It is stated in the case, that one died after he came of age, but it is stated incidentally in the defendant's answer, and for a purpose altogether unconnected with the principal question.

Now the decree considers the whole sum as real (219) estate, in which it is erroneous, and must be reversed.

The cause must be remanded for farther proceedings, and especially for the purpose of ascertaining the ages of *John* and *Miles Powell* at the time of their respective deaths.

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From Lenoir.

A father, by deed, gave a negro to his daughter, and provided in it, that if she should die without children the slave should return to his family. The deed was put into the father's possession to be recorded, and afterwards, before it was recorded, the daughter, by parol, relinquished all claim under the deed, and exonerated her father from all obligation to have it registered, and authorized him to destroy it. She afterwards married and died. Her husband

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filed this bill to set up the conveyance: *Held*, that after the daughter's voluntary renunciation, she would not have been entitled to the aid of the Court to set up the conveyance: and that the husband, succeeding to her rights, could claim nothing more than she could.

Independent of this objection, whether the Court would set up this conveyance for the husband's benefit, thus giving it a different operation from what the parties intended, *quere?*

The bill alleged that *Philip Miller*, the defendant's intestate, some years before the filing of this bill, partly in consideration of value, and partly of natural love and affection, conveyed, by an instrument of writing under his hand and seal, a negro woman slave Judith, and a negro boy slave Essex, to his daughter *Nancy Miller*: that in pursuance of the conveyance, *Nancy* took possession of the slaves and kept them for many years notoriously as her property, with the consent of *Philip Miller*; that *Philip Miller* afterwards prevailed on *Nancy* to put the writing into his possession for the purpose of carrying it to Court and acknowledging it for registration, but that he never did carry or acknowledge it in Court, nor returned it to his daughter, but fraudulently kept or destroyed it; that afterwards *Nancy Miller* intermarried with *Fordham*, (220) the complainant, she then living at the house of her brother *William Miller*, and having in her possession Essex and Judith with her increase; that Essex came immediately into the possession of *Fordham*, and Judith and her children were permitted to remain a short time after the marriage at the house of *William*, until *Philip Miller* took them into his possession and claimed them as his; that *Nancy*, wife of the complainant, was dead, and that her husband was her administrator, and as such had demanded the woman Judith and her increase, and had also applied for the instrument of conveyance, but that *Philip Miller* peremptorily refused to give up the negroes or instrument.

The answer of *Philip Miller* stated, that *Nancy Miller*, having attained the age of 32 years without marrying, and with no particular prospect of marriage in view, requested the defendant's intestate *Philip Miller* to make some provision for her in such way that she should have a maintenance for her life, and that in case of her marrying and leaving issue, the property then settled should go to her

children; but in case she did not marry or leave issue, then that the property should return to the family of *Philip Miller*; that deeming the request reasonable, *Philip Miller* made and subscribed an unsealed paper writing, the purport of which was, that *Nancy* should have Essex and Judith and her increase during the natural life of *Nancy*, and then the property to be disposed of according to the contingencies mentioned above; that this paper was witnessed and delivered to the witness with a distinct understanding between all parties concerned that it was only made to secure the provision for *Nancy* in the event of her father's suddenly dying without a will, but that it should be subject to any alteration he might think proper to make by will; that the only consideration was the affection which he felt for his daughter, nor was any consideration of any kind mentioned in the paper. Some time afterwards, in a conversation between *Philip Miller*, *Nancy*, and (221) her brother *William Miller*, it was suggested, that to prevent accidents from death, it would be well to have the paper recorded, and it was delivered to *Philip Miller* for that purpose. It happened, however, that he did not attend the next term of the Court which occurred, and before another term occurred, *Nancy* went to the house of *Philip Miller*, and told him, that as it was not recorded, it might as well be let alone altogether; that she was willing her father should take back the right; and that what she was to have, *Philip Miller* might give her by his will; and this being acceded to, no farther care was taken of the paper, which is now lost or mislaid.

TAYLOR, Chief Justice.—The allegations in the bill, as to the deed of gift of the female slave, are sufficiently made out by proof, and there seems to be little doubt of the deed of gift having been placed in the hands of *Miller* for the purpose of being registered. But the objection made to setting up the deed is, that, after the defendant had it in his possession, his daughter agreed to waive all claim under it, and trusted to her father making a provision for her by his will. Her declarations to this effect were frequent a very few days before her marriage, and in point of fact it is established. This seems to be one of the cases where a written agreement may be so far waived by parol,

that it may be a defence to a bill for a specific execution; for it was here an entire abandonment and dissolution of all claim by virtue of the deed, and restoring the parties to the situation they were in before it was made. But it may well be questioned, whether, if this were not a solid ground of defence, this Court would feel justified in setting up the agreement so as to give it a different operation from what the parties intended. That was, that if the daughter died without children, the slave should return to the family. The husband made no settlement, and was apprised of the circumstances of his wife before (222) marriage; his equity is at best doubtful. The bill must be dismissed.

HALL, Judge.—This is a bill brought by the surviving husband, who has taken out letters of administration on the estate of his deceased wife, for negro Judith and her increase, which he alleges belonged to her. If she had any title to the property in question, she derived it from the deed which it is admitted by both parties the defendant her father executed to her, and which it is also admitted was returned to the father for the purpose of being registered. If the matter rested here, although the father may have mislaid or destroyed the deed, the rights of the daughter would not be impaired, provided the contents of the deed could be established. But the evidence shows that afterwards, before the marriage of the daughter with the complainant, she released her father from any obligations which he was under to have the deed registered, and restored to him all right which he had to the negro before it was executed, by authorizing him to destroy it, and saying, if she lived and should have children, she had rather rely on the provision which he should make for her by will. If she herself was living, she could not claim the interposition of this Court, to set up this deed against her own voluntary consent given for its destruction, when she was a free agent, and where it does not appear that any fraud was practised upon her to procure that consent. As the complainant cannot be in a better situation than she would be if living and single, as to the property in question, I concur in the opinion that the bill should be dismissed.

HENDERSON, Judge, concurring also,

Bill dismissed.

LEROY v. DICKENSON.

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From Beaufort.

A judgment fraudulently confessed to cover the property of the debtor, shall be postponed to a judgment obtained *bona fide* after such fraudulent confession.

This was a bill setting forth that complainant, some time before the 14th of August, 1811, owning and holding two several bonds of *Joel Dickenson*, *William H. Williams* and *William Guthrie*, each for the penal sum of \$6,011 75, and each conditioned for the payment of \$3,055 87½, endorsed and transferred the same to *Josiah Collins*, to whom complainant was indebted, under an agreement that the same, if collected, should be applied to the payment of the debt to *Collins*; that *Joel Dickenson*, being largely indebted, and being desirous to place his property beyond the reach of his creditors, on the 14th of August, 1811, fraudulently executed to *William H. Williams* and *Jordan Sheppard* a conveyance embracing in it all the property which he *Joel* had, to be void on condition that *Joel Dickenson* indemnified *Williams* and *Sheppard* against certain debts for which they were responsible, and, among others, against the debt which complainant had assigned to *Collins*; that *Joel Dickenson* continued in possession of the property, which was worth far more than the debts for which *Williams* and *Sheppard* were responsible; that he exercised acts of ownership over it, notwithstanding a breach had been long made in the condition of the deed; that *Jordan Sheppard* died in December 1811, having first, by his last will and testament, given and bequeathed nearly all his property to *Joel Dickenson*, who was his son-in-law, "in trust to and for the use of *Louisa Dickenson*" (wife of *Joel*), and authorizing *Joel* to sell the whole or any part of his estate for the use of *Louisa D.* and her heirs; and that *Joel*, designing to defeat his creditors, fraudulently combined with one *Marshall Dickenson*, his kinsman, to (224) effect his purpose. Accordingly *Joel*, immediately after *Sheppard's* decease, took into his possession the personal property of *Sheppard*, and before probate of the will sold part thereof at public sale; and at the next term of the County Court the will of *Sheppard* was proven, and

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no executor being therein named, *Joel Dickenson* declined becoming administrator, and procured *Marshall D.* to become administrator, and joined as one of his sureties in the administration bond; and at the term of the County Court next following, *Joel* confessed a judgment to *Marshall* as administrator for \$6,525 90, on account of the property of *Jordan Sheppard*, which *Joel* alleged he had made use of and sold previous to administration granted; when in truth the value of the property taken by *Joel* was much less than the amount of the judgment confessed.

The bill stated also, that *Collins* had obtained judgments on the bonds before mentioned, after the execution of this fraudulent contrivance between *Joel* and *Marshall*; but that the property, by collusion between the parties before named, was so hedged in and covered that the execution of *Collins* was unavailing: and among other matters prayed, that the judgment fraudulently confessed by *Joel* might be postponed to the judgment of *Collins*.

There were other matters alleged in the bill as a ground for the Court's aid and interference, but the above presents the principal point made in the case, and that to which the attention of the Court was more particularly called.

There was much evidence filed in the cause, and so much as is here material will be found in the opinion of the Court, as delivered by the CHIEF JUSTICE.

TAYLOR, Chief Justice.—One object of this bill is, to postpone a judgment confessed by *Joel* to *Marshall Dickenson*, to the complainant's demand ascertained by judgment, against the former. The allegation of fraud in the (225) confession of the judgment, and in keeping it on foot to cover the property from other creditors, is abundantly established by the depositions in the cause. The circumstances disclosed are numerous, and of great variety of character, yet all conducive to the same result, and it is impossible to resist their united effect. Those which principally influence the judgment of the Court, will be briefly stated, though there are others of minor importance which have had some share in the formation of our opinion.

The judgment was confessed for upwards of six thousand dollars, and purports to be founded on an account consist-

ing of several items. One is a charge against *Joel* for the amount of purchases made at the sale; now the sale was upon twelve months credit, and it is improbable that *Joel* would expose himself to an immediate execution, for what he was not then liable. Besides, several of the purchasers of unimpeached credit, show that they paid the amount of what they bought to *Marshall* himself. There is other evidence to the fact, that some of the notes given to *Joel* for purchases were in *Marshall's* possession, and that some were transferred by him after he administered. No satisfactory explanation is made why these sums were not applied to the credit of the judgment. There are other items in the account, which at the date of the judgment *Joel* had not collected or applied to his own use; and one which, according to *Buck's* deposition, *Marshall* had received the whole of. The charge of lumber from the mills, appears from one of the depositions to be unfounded, inasmuch as there was not more on hand than was necessary for their repairs. Another strong evidence of the quality of this transaction arises from *Green's* execution, which, after it was satisfied out of *Joel's* funds, *Marshall* caused to be levied upon the house and lot. The charge for *Williams* and *Joel's* note to *May* is exposed to very serious suspicions. No charge was made for it by *Sheppard* against his sons-in-law, and it is rather to be inferred that (226) he intended it as an advancement to his sons-in-law; for the note is produced cancelled, and without any assignment, nor is any security taken from them.

And there is direct evidence that *Joel* had declared his deliberate purpose to defeat the complainant's claim, and the whole contrivance seems to be directed to that end. When to this are added, the relationship, intimacy and confidence subsisting between the parties; that *Marshall*, though succeeding to the trust held by *Sheppard*, allowed *Joel* the uncontrolled use of his property, the management of his vessels, and the direction of his mercantile concerns without applying any credits to this judgment; the manner of confessing the judgment, by the plaintiff's attorney under a power of attorney from the defendant; the apparent want of resources of *Marshall* when selected to administer; the disappearance of *Sheppard's* estate, without any administration accounts being settled;

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we can come to no other conclusion than that the judgment was covinous. It must therefore be postponed to *Leroy's* demand, and *Marshall* enjoined from proceeding on it as to *Leroy*.

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A devises lands to J. W. and his wife during their lives, and to the longest liver of them, and also bequeaths to them certain slaves, &c., for their lives as aforesaid; and after their decease he gives said property, real and personal, unto the heirs of their bodies lawfully begotten, to be equally divided among them, to them and their heirs forever; J. W. and wife are tenants for life only, and the heirs of their bodies take an estate in fee in the lands in remainder as purchasers, the remainder is contingent, and on the decease of the surviving donee for life, vests in such persons as are heirs of the bodies of J. W. and wife; a child, therefore, of J. W. and wife, who dies in the lifetime of the surviving donee, had no estate in the lands.

According to the intent of the testator, the personal property, on the decease of the surviving donee for life, goes over with the lands to the remainder men; the heirs of the body of J. W. and wife take an absolute property in the personality on the decease of the surviving donee for life, and the executor or assignee of a child of J. W. and wife, dying before the wife, has no interest in the personality.

This bill was filed in 1823 for foreclosure of a mortgage. *Ambrose Knox*, by his will duly executed, devised the use and occupation of four-fifths of his plantation, &c., to *John Wyatt* and *Parthenia* his wife, during their natural lives, and to the longest liver of them; and he also bequeathed to them the use of certain slaves and their increase during their natural lives as aforesaid; and farther, during their lives as aforesaid, the use of all his stock and household furniture and plantation utensils of whatever kind now in their possession; and after their decease, he gives and bequeaths all and singular the property, both real and personal, above mentioned (for their use during their lives) unto the heirs of their bodies lawfully begotten, to be equally divided among them, to them and their heirs forever. The testator died in the year 1796. Upon his death, *John Wyatt* entered upon the lands, and had possession of the personality until 1802, when he died; his widow surviving him, took possession of the real and personal estate, and continued it during her life. In

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1804, *William Wyatt*, one of the children of *John* and *Parthenia*, by deed mortgaged to the complainants all his interest in the lands and slaves mentioned in the above devise and bequest. *William Wyatt* died in 1817, and was survived by his mother *Parthenia*, who departed this life in the year 1821. The bill was filed against the defendants, who were the children of *William Wyatt*, and were his heirs and distributees. On the death of *Parthenia*, they had taken possession of the land and slaves mentioned in the mortgage; they were the heirs of the body of *John* and *Parthenia*, and by their answers insisted that *William Wyatt* had nothing in the premises in 1804 when he executed the mortgage, and that on the death of *Parthenia* the lands belonged to them, either under the will of *Ambrose Knox*, or by descent from *Parthenia*, and that the slaves were their property either under the said will or as the distributees of *Parthenia*. The sole question in the case was, whether *William Wyatt* had, in 1804, any interest in the lands and slaves. The Court below being of opinion that he had not, dismissed the bill of the complainants with costs, from which they appealed.

Gaston, for the appellees.—The Court below decided that the mortgagor, at the date of his deed, had no estate or interest in the real or personal property which could pass. It will not be denied, that every thing that may be considered property, remainders, reversions, possibilities and executory interests, are transmissible, descendible, devisable and assignable. It is so laid down in *Powell on Mortgages*, 25; and in *Jones v. Roe and Perry* (3 Term, 88), it was decided, that a possibility coupled with an interest may be devised.

To support the decree below, it must be shown that (under our act of 1784, “to do away entails,”) the whole estate passed to *Wyatt* and wife, and that on his death the wife was seized of an estate in fee in possession.

(229) And even if this be correct, the decree below was wrong as to the personalty, for the husband, *as such*, was absolute owner of whatever property in *that* was given to his wife, and on his death, *William*, his son, was entitled to a distributive share of the slaves. (*Com. Dig. Baron and Feme E.*, 3.) Whether *William* had an inter-

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est in the lands depends on the inquiry whether the words "heirs of their bodies begotten," used in the devise, be a limitation of the estate given to the husband and wife, or whether they designate the heirs as purchasers of an estate in remainder after the life estate of the husband and wife; the appellees must contend that, according to the rule in *Shelly's* case, they are to be regarded as limiting a fee to the baron and feme.

This rule, according to *Hargrave*, is adopted to prevent the qualities and properties of a purchase annexing to a real descent, to render impossible the creation of an *amphibious* inheritance, that is, a freehold with a perpetual succession of heirs without the other incidents of an inheritance; an inheritance in the first ancestor, with a privilege of vesting in the heirs by purchase. (*Hargrave's Law Tracts*, 565, 572.)

This rule is not the medium to find out the intent; it supposes the intention to be previously discovered; that is that there is a gift of a freehold to some person, and a superaddition of a succession of heirs to *that* person; making him the ancestor, terminus or stirps, by reference to whom the whole generation and posterity of heirs is to be ascertained. (*Hargrave's Law Tracts*, 574.)

The ordinary rules of interpretation are to be first resorted to, to arrive at the meaning of the testator. His meaning must be first adjusted without reference to the rule. (*Ibid*, 575, 576.)

If it appears that the testator did not mean to use the words "heirs," or "heirs of the body, &c.," in their full and technical sense, but intended to designate *the person* who should be "heir," or "heirs of the body" of (230) the donee for life *at his death*, and to make such person an ancestor, terminus or stock for a new succession, *then* there is no room for the application of the rule. (*Ibid*, 576.)

The sole inquiry is, whether the remainder to the heirs of the donee for life be designed to include *the whole of his inheritable blood*, the whole line of his heirs, or to designate an individual answering to the description of heir of the donee for life at his death, to whom an inheritance is to be given. (*Ibid*, 576, 577.)

These principles are sanctioned by the decision of the

Chancellor in *Jones and Morgan* (1 Bro. Ch Ca., 206). To apply them to the case under consideration. It is perfectly clear, the words "heirs of the body," in the will of *Know*, were not meant to include the whole line of heirs, but individuals *only* of a certain character, existing at the death of the tenants for life. For to suppose that by "heirs of the body" is intended the whole line of succession, is to impute to the testator an unlawful and impracticable intention, to wit, to create an entail; and where words are susceptible to two meanings, one unlawful and the other lawful, the latter is to be presumed to be the sense in which the words are used.

Secondly. It cannot be supposed that the testator meant to entail the trifling farming utensils, carts, ploughs, &c., as well as the lands and slaves.

Thirdly. Testator anxiously expresses his intention not to give the *property* to *Wyatt* and wife, but the *use* only. They may take a life estate; it is clear no greater estate was given them.

Fourthly. The words "after their decease I give, &c.," is a guarded expression, and shows the testator's intent to give them a life estate only; the moment of their decease was to be *that* of the commencement of a new estate. The words "after the decease," have been regarded in executory devises as tying up the contingency to the moment of death, and changing the general meaning of dying (231) without issue. *Penbury v. Ekons* (2 P. Wms. 563), *Wilkinson v. South* (7 Term 555).

Fifthly. The gift "to the heirs of their bodies begotten, to be *equally divided* among them," is conclusive to show that the "heirs of the body" were to take as purchasers; for if they were to take as heirs by descent this *equality of division* is absurd; the division must be governed by the statutes regulating descents. If there were *two* children, and both dead at the death the tenants for life, the *one* leaving an only child, and the other leaving many children, the *equality* of division could not take place by the law of descents. Again, the words "equally divided between them," have a just application to *individuals* taking a new estate; but are absurd if applied to series of heirs taking in succession from and upon the death of each individual heir.

Sixthly. The gift is not only "to the heirs of the body," but "to them and their heirs forever." These words of a limitation in fee engrafted on the devise to the heirs of the body, show beyond any reasonable controversy, that the "heirs of the body," were individuals of a certain description, who, at the death of the donees for life, acquired a new estate in fee, and that they were termini stocks or ancestors from whom the succession of heirs in fee were to be derived.

The construction put upon the clause of the will by the appellants, gives to every word its proper meaning, makes a reasonable disposition of the property, and supposes the intent of the testator to have been a lawful one.

Excellent directions are given by *Butler* (*Note to Co. Lit.*, 376, *b.*), as to the rule in *Shelly's* case. First, to ascertain from the incorrect and inartificial language of the will the meaning of the testator, and to express it with technical accuracy; and then to inquire whether the estates created by the terms of art be lawful or not. Let this be done in the clause of *Knox's* will. It is an estate to *Wyatt* and wife for life; remainder in fee to those who, at (232) their death, should be heirs of their bodies begotten, to them for life, remainder in fee to their children. The same as in *Doe v. Perran* (3 Term 484). *Doe v. Profost* (4 John, 61).

According to Justice *Blackstone*, when it appears that heirs are intended to take as purchasers they shall so take; and this may appear either when words of explanation are added to the words heirs, &c., whereby it appears, issue sons, eldest son, &c., were meant; or where the testator hath superadded words of limitation to and upon the heirs to whom the estate is given. Argument in *Perran v. Blake* (*Harg. Law Tracts*, 505, 506).

It is easy to show, that in wills like this, and where the evidence of intent was not stronger, that these words "heirs of the body," have been interpreted children, and held so to be words of purchase. They were so interpreted in *Cheek v. Day*, reported in *Fitzg.*, 24, and *Oro. Eliz.*, 313, and in *Archer's* case, 1 *Rep.*, 66, both cases being cited in Justice *Blackstone's* argument. (*Hargrave's Law Tracts*, 506.)

It is true, in these cases, "heir" in the singular number

was used and not "heirs." In England, the eldest son takes as heir; and if there be no son, *all* the daughters take; and though there may be more than *one* daughter, yet they take but as *one* heir. With us all the children take as tenant's in common, and are all heirs. Therefore, the words "heirs" in our law answers to the word "heir" in the singular number at the common law, and all the arguments and reasonings applicable to the superaddition of words of limitation on a gift to the "heir" in the singular number in a devise of lands in England, hold with equal strength to a like superaddition in a gift to the "heirs" in the plural number under our statutes of descent; for "heir" would not apply with us; it must be heirs in the plural. See the opinion of Lord *Mansfield* in *Doe v. Laming*, 2 *Burr.* 1110.

Luddington v. Kime (1 *Salk.*, 234), is a devise to (233) "issue male," and not to heirs of the body, and in all other respects resembling the case under consideration.

In *Lane v. Davis* (2 *Ld. Raym.*, 1561), heirs of the body are explained by the context to mean children.

Den on demise of Long v. Laming (2 *Burr.*, 1110), referred to above, is a devise of goods and lands in almost the words of *Knox's* will, and the words "heirs of the body" are construed to mean children.

Goodtitle v. Herring (1 *East* 264), *Doe, lessee of Strong, v. Golf* (11 *East*, 668), show that heirs of the body may be words of purchase; and in *Goodtitle v. Harris*, 276, per *Le Blanc*, there is no rule of law to prevent the words "heirs of the body" from creating a purchase if so intended.

It is, therefore, submitted for the appellants, that the whole estate did not pass to *Wyatt* and wife by the will of *Knox*, but a life estate only, with a remainder to their children living at the death of the testator and to after-born children as they should come in esse; and that *William Wyatt*, being one of the children surviving at the death of the testator, took a vested remainder in the property, real and personal, devised to him by *Knox*, and that his interest passed to the complainant by the deed of mortgage of 1804, and therefore the decree below must be reversed.

Hogg, for appellees.—*William Wyatt* had no estate in

the property mortgaged to the complainants. It has been argued for them, that even if he did not take directly under the will of *Ambrose Know*, yet as distributee of his father *John Wyatt*, he had some interest in the personalty. The mortgage and the bill for foreclosure contemplate no claim of *William* under his father *John* as distributee. It is not mentioned in the case whether the father died intestate, or whether there was any administrator or executor, and neither of them is a party to the present bill, nor is any relief asked against them. So that if (234) the complainants claim from *John Wyatt*, they should file another bill. But *John Wyatt*, the father, had no interest in the property to transmit to his executor. The personal property, *on this supposition*, is bequeathed by *Ambrose Know* to the husband and wife for their joint lives, and to the survivor absolutely. It is argued for the complainants, that a gift of the personalty to the husband and wife jointly, and their heirs, is a direct gift to the husband. It is conceded by the defendants, and farther, that every personal chattel of the wife in the possession of the husband, or which, by *possibility*, may come to her possession during the coverture, shall be *his*, and that he may release or assign it without taking possession, so as to defeat all survivorship in the wife. But it remains for the counsel of the complainants to show "that an interest in a chattel which was *not* in the *possession* of the husband during the coverture, and which could not vest in the wife until after she was *discovert*, shall belong to the husband's executor. No authority has been or can be shown for such an extraordinary position. The authorities to the contrary will be found collected in *Roper on husband and wife*, 238, 239. The counsel has totally misapplied the law whereby a present gift to the wife during coverture enures to the husband. The reason of the law is, that during the coverture the husband and wife are *one* person, and all power over their joint property is in *him*; but this reason must be left out of view, or misunderstood, when it is insisted that the husband is entitled to an interest in a chattel not given unless the wife survive, and not to vest until the *identity* of person has ceased, and the wife has become, by survivorship, a distinct person *in law* as in fact, and when the personal rights of the husband are dead with them.

The right of the complainants to reverse the decree must, therefore, depend on their claim under the will of *Ambrose Knox*. The devise and bequest of the property, real and personal, lands, slaves, stock and furniture, is to (235) the husband and wife during their natural lives, and to the longest liver of them; and after the decease of the survivor, unto the heirs of their bodies, to be equally divided among them, to them and their heirs forever. Now it would seem there could be but *two* constructions put on *this* testamentary disposition. Either that the husband and wife should take the whole interest and estate in the real and personal property to which their representatives should succeed by law, or that they should take a life estate only, and the heirs of their body should take a contingent estate at their death. The complainants rejecting both *these*, ask for a third interpretation, whereby the husband and wife should take an estate for life only, and a *vested* remainder should be in the *children* of the husband and wife living at the making of the *will* or at the death of the testator, and that the children unborn should have vested remainders as they should come in esse.

To adopt this last construction would be to make, not to interpret the will. The testator hath said, "after their decease I do give all and singular the property, both real and personal, unto the heirs of their bodies." Now waiving the consideration, how these persons are to take, whether by descent or purchase, it would seem impossible to suppose that any other than *heirs* are to take, unless the testator has given some other description to control the meaning of "heirs of the body." He has said it is to be divided among them, and to be to them and their heirs forever. Do either of these phrases control the meaning? It has been said "divided" does; for that heirs are, by the *common law*, a series, and take consecutively and never distributively; and that, therefore, the division which is directed cannot be made among them, but must be among children who may take distributively. This reason would be unanswerable at *common law*; but this will was not made at *common law*, but under statutes that enable all persons in equal degree, for instance all "children," to take as heirs. So that heirs are not with us a (236) series *only*, but also a series of classes; wherefore

heirs now do not take *successively* only, but distributively, as tenants in common; and the word "divided" applies to children and to heirs with equal fitness and propriety. It is said, however, that words of limitation are superadded, and therefore heirs of the body mean children. Whatever weight these words of limitation will have upon an inquiry whether they take as purchasers or in succession, they cannot aid us in ascertaining who are to take, children or heirs of the body. There are then no words designating children to take any interest in the real and personal estate. Whether heirs of the body *ex vi termini* ever mean children, when personal property is given to a parent, and remainder in purchase to the heirs of the body, and whether the words shall have the meaning in this testamentary disposition, will be more properly discussed in the course of the argument.

It is denied on the part of the defendants, that the children as such of *John* and *Parthenia* took a remainder in fee in the lands, and an absolute property in the chattels, consequent on the interest for life given to the wife as survivor; and it is insisted, that supposing the words "heirs of their body" to be words of purchase, that at common law the person who claimed as purchaser must survive both and be the heir of both *John* and *Parthenia*.

It is decided in *Frogmorton v. Wharrey* (3 *Wilson*, 125, 144), on a surrender of copyhold from A to B whom he intended to marry, for life, and to the heirs of their bodies &c., that the heirs of the body take by purchase, and on the wife dying *in the life of her husband*, her son could not take in remainder by purchase, as not being heir of both. See *Roe v. Quartley et al.* (1 *Term*, 630, *S. P.*)

Archer's case is an express authority, that in a limitation to one for life, with a contingent remainder to the heir of his body, that the heir apparent has no interest, but that the heir proper of the tenant for life, that is, *one* who survives him and is entitled to succeed to his inheritance, (237) is the person designated to take the estate by purchase. *Stith's heirs v. Barnes* (4 *N. C.*, 484), is a decision of this Court to the same point.

These authorities are conclusive as to the real property, and these would appear to be *decisive* of the whole case, for the question is one of intention; who are the persons

to take in remainder? As to the lands, upon authority the persons are certain, the *heirs* of the husband and wife. Doubtless it was the meaning of the testator, that the individuals who were to take the lands, should take the personalty also. He intended the lands and chattels to go over on the same event to the same persons. It is a rule of construction, that a gift of a chattel to one and the heirs of his body, which would be a free tail of real estate shall vest the chattel in the first taker absolutely; but supposing the intent manifested that the heirs of the body shall take as purchasers, there is no rule of law prohibiting them to take. As if the testator in so many words should devise real estate and a personal chattel to A for life, remainder in purchase to such persons as at the death of A should be the heir at law of A, to such person and his heirs forever. If it be conceded that the devise did not make A tenant in tail of the real estate, but that his heir at law took as a purchaser, is there any reason why the personal chattel should not, on the decease of A the tenant for life, go over to the heir at law of A with the real estate? Certainly the rule of construction does not apply, for the devise of the real property does not create an estate tail, and therefore the bequest of the chattel shall not create an absolute property in A. It follows, therefore, if the "heirs of the body" of the husband and wife, upon the authorities cited, take the *real estate* as purchasers on the decease of the wife who survived, and that the children as such of the husband and wife *did not take* a vested remainder in the real estate, that the same "heirs of the body" shall, on the decease of the wife, take the personalty as purchasers, and that the children shall not take in the per-

(238) sonalty, a vested remainder, *because* by the will of the testator the realty and personalty, on the decease of the surviving donee for life, shall go to the heirs of the body of the husband and wife. The rule of construction will be found laid down in *Butler's Fearne*, 490, supported and illustrated by many cases, and in 2 *Roper on Legacies*, 393. And although the exceptions to the rule are many on the particular wording of bequests, where explanatory words have been added, importing that the testator meant *issue* or children, in which it has been held that the issue or children should take vested interests as

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they came in esse; yet these cases will not avail the complainants in their claim of the personalty, because the testator, by giving the personalty, with the lands, has shown he used the word "heirs" in a technical sense, to denote persons who would succeed to a joint fee of husband and wife, to take both the lands and chattels after the decease of the donees for life *by purchase*; and there is no maxim in law to hinder these persons, the "heirs of the husband and wife," to take according to the intent of the testator to the exclusion of the executor or assignee of a child dying in the life time of the mother. If the testator meant that the grand-children of *John* and *Parthenia* Wyatt, surviving them both and being the heirs of their real estate, should take the chattels mentioned in the will in exclusion of the executor or assignee of a child of *John* and *Parthenia*, who might die in the life time of one of his parents, the intent is a just and lawful one, and must prevail. He did so intend, for it is to their "heirs" that he does give *both* the lands and chattels.

But the defendants deny that the heirs of the survivor of the husband and wife took a distinct estate *by purchase*, and affirm that the words "heirs of their bodies lawfully begotten, to be equally divided among them, to them and their heirs forever," are words of limitation, and import no more than that the heirs of the husband and wife (239) were to succeed to the estate *after their decease*, as tenants in common.

The rule in *Shelly's* case is fairly cited by the counsel of the complainants from *Hargrave's Tract*, and the observations of *Hargrave* show the meaning and application of the rule. The sense of the rule is expressed with great precision and accuracy by Chancellor *Thurlow* in *Jones v. Morgan* (2 Bro. C. C., 206). "It is not," says the Chancellor, "a question whether the ancestor should take for life only, for the testator, in most of the cases, means the first taker, a life estate only; but the true inquiry is, whether the heir shall take in the *character* of heir, for if so he must take in the *quality* of heir; and again, if the estate is to go to *every* person who can take as heir to the first taker, the word heir must be in limitation, and all heirs taking must be in by descent; as *Hargrave* expresses it, if the ancestor be the terminus, and the whole line of heirs

(in tail or in fee) be to take after him, they must take by succession.

It is said that the whole line of heirs are not to succeed by the will of *Know*; because words heirs of the body are not technical words by the laws of this state. It is insisted for the appellees, that the words "heirs" are not less words of art since than they were before the abolition of entails, although the words "of the body" do not, as formerly, control their meaning and confine the descent to *lineal* heirs. The word "heirs" retains its technical sense although the words "of the body" have lost their significance. The case of *Jones v. Spaight*, 4 N. C., 544, cited by the plaintiff's counsel to prove that "heirs of the body" is not a technical phrase, decides only that a limitation of an estate to one of his heirs, and to another if the first taker should die without *leaving* heirs, shall not convert the fee into an estate tail at common law, but shall mean a dying without issue living at the death of the first taker, and that it shall be good as an executory devise; it decides nothing as to the meaning of heirs of the body.

(240) But as to the effect of the word "leaving," the Judge, in delivering the opinion of the Court, however, expressly notices the idea advanced by one of the counsel in arguing that case, that the words should create an estate tail at common law for an instant which by the statute would be converted into a fee, for the purpose of stating that the words "heirs of the body" create a fee as heirs do at common law; and that the case is therefore an authority that heirs of the body are technical words, and mean neither more or less than heirs; and we suppose if there is no decision, that a limitation by a deed to A and the heirs of his body begotten, would give a fee simple to A, and none but words of art can operate in a deed. It is said by the counsel that one is a lawful and the other an unlawful intent of the testator. We profess not to understand *this*; the testator might lawfully give by purchase or succession, and the whole controversy is, which of the two meanings shall be put on the testamentary disposition. If by unlawful intent, it meant that the testator could not make an entail by will, the answer is, that it is true that he could not; but the heirs shall not take by purchase, nor shall the devise altogether fail because the words at com-

mon law would have created an entail, but the same words shall, since 1784, by legal intendment, create an entail in fee simple. It is said an usufruct is given to the tenants for life to their use, &c., and for life and no longer, and that this shows the testator meant the heirs should take as purchasers. It is settled on authority beyond dispute that a devise of the *use* of realty or personalty and of the thing itself; and again, that a devise to A and his heirs, and to A for life and no longer, remainder to his heirs, are identical in meaning, and differ in words only. "After their decease" is relied on to show a purchase was meant, it is not very easy to discover wherefore, as the words imply nothing more than that the succession or purchase shall begin after the decease of the survivor.

(241) It is said that the words "divided amongst them," shows the testator intended the heirs should take as tenants in common and not in succession, and English cases from *Vesey Jun.* and *Ambler* are cited to show that these words would make the heirs take as purchasers, *because* they could not *succeed* as tenants in common. But it has been already shown, that because primogeniture is abolished in this state, and lands descend to heirs in common by statute, that these cases *fail* in their application.

The great question *then* in this case is whether the superaddition of words of inheritance upon the limitation to "heirs of the body," shows that the heirs of the body were persons designated who were to take estates in fee simple. Independent of all cases on the subject, as it has been shown that heirs of the body mean in *our* law *heirs*, it is strange, upon principle, that an estate to A and his heirs and to their heirs, should mean aught else but a succession; but let it be examined on authority. An estate to A and his heirs, or heirs of his body, is *prima facie* in a will an estate in fee to A; and the onus is on those who claim against him to show that he has less than a fee. *For this purpose* the complainant's counsel has first cited *Doe v. Perrin* (3 Term, 484), where the devise is in remainder to the *children* of A, and their heirs forever. Children is not a word of limitation, but of purchase.

The next case cited is that of *Cheek v. Day*. In that the remainder is to the next *heir* male of A, in the singular number, and his heirs. Heir in the singular number

is not a word of limitation, but a word of purchase. (See *Co. Lit.*, 7 b.)

Archer's case is cited from 1 *Rep.* 55, and is a devise to *Robert* for life, and to the next heir male of *Robert* and his heirs. Again, heir is in the singular number, and therefore not a word of limitation but purchase.

2 *Burr.*, 1110, *Doe v. Laming*, is greatly relied on; that was a devise of gavelkind to A and the heirs of her body, female as well as male, and their heirs. By (242) the custom of gavelkind females could not inherit; it was therefore held, that heirs was not used in a technical sense, and as the females could not take in succession, they must therefore take by purchase to give effect to the intent of the testator. It was in that case said by the Chief Justice, that the reasoning as to the heir in the singular number at common law, applied to the heirs in gavelkind in the plural number; but with great submission, this dictum does not seem well founded, as heir is properly a word of purchase by common law and by custom, whereas heirs is a word of limitation in both, although it means in one that the eldest son and all the daughters shall succeed at law, and all the sons shall succeed by custom in lineal descent. It would seem, therefore, that an estate to A and his heirs and to their heirs by the custom, as it included the whole inheritable blood of A, should create a succession and not a purchase in the heirs of A. The remark of the Chief Justice was not necessary to the decision. as the case turned on the word *female*.

1 *East*, 264, is also cited; it is a devise to A for life and successively to such son or sons. Son has been always a word of purchase. 11 *East*, 668. To daughter for life and her heirs of her body as tenants in common, and if such issue should die before twenty-one, &c. Heirs at common law could not take in common; and this with issue, which is a word in purchase, controls heirs of the body. In the present case, heirs do take in common, and the word issue is not used. The case from 11 *East* cannot be reconciled with *Doe v. Applen* (4 *Term* 82).

Jacobs v. Omeott (4 *Bro C. C.*, 542). This is a bequest of personalty to A for her life, and from and immediately after her decease to the heirs of her body, to be equally

divided between them share and share alike, and in default of issue over. This is of personalty and a bequest over. It would not have created an estate in tail in real estate because of the tenancy in common, and there was a bequest over in default of issue. There is in *Jarvis* (243) v. *Wyatt*, real estate, which renders the phrase of heirs technical, and what has been often repeated, the heirs by our act of assembly, take share and share alike by implication of law, and there is no mention of issue to limit the expression of heirs.

Hodgeson v. Bussey (2 *Atk.*, 89), is a bequest of *personalty* to heirs of the body, their executors, &c. It was impossible to understand the testator to use heirs in a technical sense. 2 *Vessey*, 238, is cited to show, that in bequests of chattels, where heirs of the body by explanatory words are taken to mean *children* or *issue*, that Courts have labored to make them take vested estates as purchasers when in esse, or when they come in esse, instead of waiting the death of the first taker to become properly heirs of the body; which is not denied where personalty is the sole subject of bequest, and when it is ascertained that heirs of the body, by explanatory words, *do* mean children which is, however, the matter in controversy.

The counsel for the complainants did not cite the cases of *Walker v. Snow* and *Lisle v. Gray*, on the argument as to the effect of superadded words; but as we cannot reply, it may be well to notice in transitu that they are devises to the first, second, third son, &c., and so to the heirs of the body of the tenant for life and the heirs of their bodies in succession, &c., and so referring to third son and meaning fourth, fifth, sixth sons, &c., in tail, sons being a word of purchase. *Luddington v. Kime*, *Backhouse v. Wills*, *Law v. Davies*, are limitations to *issue* and their heirs, issue being a word of purchase. These cases are cited in Mr. *Fearne's Essay*, and commented on.

All these cases are *affirmative*, and show that if the limitation be to a person known or unknown, by proper terms of purchase, as heir in the singular number, heir female in gavelkind, issue, sons, &c., with superadded words of limitation, that the estate *shall vest in the persona designata by purchase*.

Negative authorities of the highest character abounds

(244) to show, that if *proper terms of limitation* be used, and words of inheritance superadded, that the estate shall *not vest by purchase, but shall descend in succession.*

Shelly's case (1 Co., 93), is an express authority; limitation to the heirs of the body in the *plural* and to the heirs of their bodies, an estate tail in the first taker.

Minshull v. Minshull (1 Atk., 412). First heirs male of the body and the heirs male of the body; distinction taken between singular and plural, and between this and *Archer's case*.

Wright v. Pearson. To T. R. for life, remainder to the heirs male of T. R. and their heirs; T. R. tenant in tail.

Legate v. Sewell (1 P. Wms. 187), and *Goodright v. Puller* (2 Ld. Raym., 1437, S. P.). These cases are collected by *Fearne*; and in page 183, of *Butler's edition*, it is remarked by the author of the essay, that the words heirs and heirs of the body in the plural, are sometimes abridged by words altering the descent as to A and the heirs of his body and the heirs *male* of such heirs, but never enlarged; and he cautions his readers not to confound these with the cases where words in tail have words in *fee* superadded, in which case the superadded words are surplusage. And *Butler*, in note to *Fearne* 203, says, Mr. *Fearne's* doctrine has been confirmed in *Webb v. Puckey* (5 Term 299), to which we refer. *King v. Burchell* (*Ambler* 379), is a very strong case for defendants. *Williams and wife v. Holly* (4 N. C., 286), is entitled to great consideration as a decision of this Court; the devise was "to my daughter and her husband during each of their lifetime and no longer, if dying without any lawful heirs begotten of their bodies; and if any lawful heir, to that and to its heirs forever; otherwise to my right heirs." This was before 1784, and the question was whether there was an estate tail in the husband and wife, or a life estate in husband and wife only, and an estate tail in contingency in their heir. The Court held, because of the words of inheritance that followed the life estate of the husband and wife, that (245) they took an estate tail, which was converted to a fee by the act of 1784.

On the whole it is certain, on authority, that words of inheritance superadded to heirs in the *plural* number, do

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not enable the heirs to take as *purchasers*; and there is nothing to distinguish the present case from that of *Shelly*, except the words "divided among them," which make the heirs tenants in common; and as this is the course of descent according to the statutes, it follows that they cannot have any effect in creating a purchase on the maxim of construction, that *impressio eorum qua tacite insunt nihil operatur*.

Gaston, in reply.—A gift to the wife of a personal chattel, is to all intents and purposes a gift to the husband, and therefore supposing the estate in the personalty in the husband and wife, yet as the husband would then be the absolute owner, his son *William Wyatt*, as his distributee, would have an interest in the personal chattels, which passed by his deed to complainants. This is met by saying that here is a gift to husband and wife jointly, with remainder to the survivor. It is not so; a husband and wife cannot have a joint estate in a chattel, for a gift of a chattel to husband and wife vests solely in the husband.

2dly. "The heirs of the body" in the devise and bequest do mean children. The case of *Doe, lessee of Long, v. Laming*, before cited, has not been answered, and is unanswerable on this point of the case. See the opinion of Lord Mansfield, 2 *Burr.*, 1106, 1110, and per Justice *Wilnot*, 1112. "Heirs of the body" are not in all cases and under all circumstances words of limitation; the true principle that must govern all cases of this kind is the *intention* of the testator, provided it be not inconsistent with the rules of law. If they do mean children the remainder vests in those living and in others as they are born.

3 *Term Rep.*, 484, before cited, and 5 *Mass. Rep.*, (346) 537, as to the real estate, and so as to the personal property, 4 *Bro. C. C.* 542. 2 *Ves.* 238.

These cases are distinguishable from that in 3 *Wilson*, 125. These are cases in last wills where the intent of the testator shall prevail, if not inconsistent with the rules of law. The case at bar is also a will, and the case relied on by the appellee's counsel from 3 *Wilson*, is on the construction of a conveyance *inter vivos*, where the words must be construed with technical strictness.

3dly. As to the rule in *Shelly's* case; the premises are

wanting for the application of the rule; the words heirs of the body are qualified by new words of limitation consequent to and engrafted on them. *Thurlow's* opinion is the same as *Hargrave's*. The case of *Jones v. Morgan* turned on the want of the superadded words. Hence *Thurlow's* significant remark to *Mansfield*, who cited *Low v. Davies* for plaintiffs, "I did not hear you state my words of limitation afterwards;" and a like remark of *Kerzon* to *Leaz, Sergt.*, on citing the case of *Jones v. Morgan* in *Goodtitle v. Herring* (1 East 270), "I argued the case; there were no superadded words of limitation to the heirs male in that case." And again in delivering his opinion, "I well remember the case of *Jones v. Morgan*; there were no words of limitation added to the devise to the heirs male, which has always been holden to be of great weight in cases of this sort." *Shelley's* case (1 Rep. 93), was cited for the appellees; the words in that case are, "to the heirs male and to their heirs male;" there is no inconsistency, the superaddition is mere surplusage. *Wright v. Pearson* (*Ambler*, 355), cited in *Fearne's Essay*, 126, is relied on for the appellees; *Fearne* states the Lord Keeper *Henley* as deciding it on the intention of the testator in that particular will, as holding it immaterial whether the word heir was in the singular or plural number. *Legate v. Sewell* (1 P. Wms. 87), is a limitation of heirs male on heirs male, and therefore is merely surplusage; and note the opinion of Justice *Tracy* (who differs from a majority of the (247) Court), that *Archer's* case was not decided on the word "heir," which being *nomen collectivum* would have created a fee as the word "heirs," but that the heir in that case took by purchase because of the limitation over to her heirs. *Goodright v. Pullen* (2 Ld. Raym., 1437). The subsequent words of limitation were doubtful and uncertain in their application; *Fortescue* thought they might refer to *Nicholas*. *Williams v. Holley* (4 N. C., 286). The devise was before 1784, when entails were in force in this state. It is perfectly clear, that heir when first used means heir of the body, and when subsequently used must have the same sense; so the whole is to the tenants for life, remainder to their lineal descendants, and so within the terms of *Shelley's* case. The case of *Doe v. Lum- ing* is an authority for every point made by the appellants;

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1st. It decides that heirs of the body, &c., are to be understood as words of purchase if the testator so intends. 2dly. *Anne* having died before the testator, it decides that her children took a vested estate, and that their remainder was not contingent on the life estate of their mother, and that they need not answer the description of heirs of her body. Thus these words heirs of the body may mean children in devises of real estate; they ordinarily do in personal property. (4 *Bro C. C.*, 542. 2 *Roper on Legacies*, 402.) The reason for interpreting words "heirs of the body" to mean children (since 1784 when entails were done away) in the devises of lands, is as strong as in bequests of personalty in England.

In conclusion: One of *three* meanings must be attributed to the testator. First, a life estate to *Wyatt* and wife, remainder in tail to their issue. If this meaning be imputed, the words "equally to be divided" and the super-addition "to them and their heirs," must be rejected; it must be supposed that the testator intended to create an estate not allowed by law, and to create it in personalty as well as in lands. The whole estate will be given to (248) the husband and wife for whom the testator meant a usufruct only, and nothing will pass to the heirs of the body for whom he meant an absolute ownership; and thus the whole scheme of the devise will be destroyed as effectually as if you expunge every word from the will except the devise to *Wyatt* and wife.

Secondly, a life estate to *Wyatt* and wife, with a contingent remainder in fee to such persons as at the death of the survivor of husband and wife, might be the heirs of their bodies. This is to suppose "heirs of the body" to be used in a strict technical sense, and to mean heirs in tail. The words "equally to be divided" must be rejected, as equality of division was established in fee simple estates only (1 *N. C.*, 402); personalty as well as realty will be entailed. It supposes that the testator did not mean his bounty for persons in existence and known to him, but for persons unknown to him, who were to come into existence, and whose whole merits with him were that they would stand in a certain legal relation to the tenants for life; the whole property would be in abeyance for the lives of *Wyatt* and wife.

Thirdly, the property was intended for *Wyatt* and wife for their lives only, remainder to their children absolutely; the children of *Wyatt* and wife were to have the whole estate and property, subject to the life estates of their father and mother. This is perfectly consistent with every expression, explains and reconciles every term, is consistent with the ordinary motives of human action, and is adapted to the nature of the property, produces no legal inconvenience, and is forbidden by no legal maxim.

TAYLOR, Chief Justice.—That the testator intended *John Wyatt* and his wife to have no more than the enjoyment of the subject devised, during their lives and that of the longest liver, seems evident from the terms he uses in the will. He “lends the use and occupation” of the plantation to them “during their natural lives, and to the (249) longest liver,” and he “leaves them the chattel property during their lives as aforesaid;” thus showing his wish that they should be restrained from the power of disposing of the land, so as to defeat the ulterior devise to their heirs. He then provides that *after* their decease, all the property thus given shall go to the heirs of their bodies lawfully begotten, to be equally divided among them and their heirs forever.

It is agreed on the part of the defendants, that whatever the testator’s intent might have been, yet the legal operation of the devise was to give an estate for life to *John Wyatt* and his wife, and an immediate remainder to their heirs, and that in such a case the rule in *Shelley’s case* applies, and vests in the ancestors an estate in fee simple.

I think it evident that the words “heirs of their bodies,” as used in this will, were designed to secure the estate in the first place to the descendants of *John* and *Parthenia*, and to make their issue the stock or root of the future succession, since if they had both died without leaving such issue, it would have contravened the intent of the testator to suffer the property to devolve on their collateral heirs. Upon the death of the devisees it would have vested in their lineal descendants as tenants in common, but the design of the will having taken effect, it would be an absolute estate in such children or grand-children, descendible to their heirs general.

According to the authorities, “heirs of the body” have

beer held to be words of purchase, when the testator hath superadded fresh limitations, and grafted other words of inheritance upon the heirs to whom he gives the estate; thereby showing that those heirs were meant by the testator to be the stock of a new descent. Where the heirs are thus made ancestors, it is evident that the terms "heirs of the body" are merely descriptive of the persons intended to take, and import such sons and daughters of the tenant for life as shall also be heirs of his body. This exception

to the rule in *Shelly's* case is well established by the (250) cases referred to, particularly *Archer's* case, and *Lisle v. Gray*, and *Lowe v. Davies*.

Although it appears plain to my apprehension that the heirs take as purchasers, yet I think it unnecessary to say much more on this point, because it can make no difference in the decision of the cause; since in neither case could *William Wyatt* become entitled to any thing during the life-time of his parents.

There are not on the face of the will any sufficient indications that the testator meant to use the word "heirs" in any other than its technical sense, that is this, those who should answer the description upon the death of the ancestor, until which event it must be unknown who would be his heirs. On the contrary, the will devises it to the heirs *after* the decease of the father and mother, and it is consequently a contingent remainder to those who should be heirs of the body on the death of the survivor. As the real and personal estate are disposed of by the same words, the construction must be the same in both, and no part of either vested in *William Wyatt*. The husband and wife had a joint estate for life in both, and upon the death of either, the survivor became entitled for life, nor does it seem to me that it was such an interest in the wife as the husband might have assigned or released, so as to destroy the right of survivorship. (*Shepherd's Touch.*, 344. *Cro. Car.*, 222. 1 *Salk.*, 326. *Cro. Jac.*, 570.) I am of opinion that *William Wyatt* having died before his surviving parent, took nothing in either real or personal property.

HENDERSON, Judge.—Where the superadded words *equally to be divided between them* stricken out, and the case

decided according to the laws of England, there would be no doubt but that the wife who survived her husband would take an estate in special tail; that the estate created by the devise should stand thus, an estate to husband and wife during the coverture with a contingent remainder in special tail to the survivor; for the heirs of the body (251) being called to the succession in the character of heirs, must take in the quality of heirs, which could not be effected without according to the ancestor an estate descendable to the heirs of her body, and this, regardless of the intent of the devisor, for the question is not what he intended to do, but what he has done; he has called to the succession the heirs of her body after giving to her a life estate; and they claiming in their character of heirs, the ancestor must have an estate of inheritance herself, for the heirs as heirs can take only that which was in the ancestor. But since abolition of estates tail, heirs of the body can no longer take in that character, and therefore cannot take in the quality of heirs, in their proper sense they can no longer be considered as words of limitation or expansion; they must therefore be understood as words of purchase, when we are ascertaining in what character they are called to the succession, and in deciding on the question whether the ancestor took an estate of inheritance, or a bare estate for his life only. It is admitted, that if an estate be granted to A and to the heirs of his body, that A has a fee simple, not that it is *converted* into a fee simple by the act of 1784, it was not otherwise for a moment. The legislature declared by that act, that all such limitations thereafter made should create a fee simple descendable to the heirs collateral as well as lineal. We cannot, therefore, by construction, turn a life estate into an estate tail, and then give it up to the operation of the act of 1784, and thereby entirely defeat the intention of the devisor; for in such case the collateral heirs would succeed on failure of lineal heirs. Heirs general include the whole inheritable blood. By our law the latter description have lost their character; our law knows of no such body of heirs taking exclusively. But the words have not lost their meaning, as a *designatio personarum*; they point to the same persons that they did before the act of 1784. When the person designated comes to claim, and

not before, the question then arises, in what character does he claim? in order to ascertain in what quality he should take. If, therefore, an estate for life be given to A, remainder to the heirs of his body, and a collateral heir, a brother, should come to claim, the question in what character he claims would never arise; the previous question would dispose of his claim, that he is not the person designated; he could therefore claim in neither character. As well might it be said that the two estates unite where the limitation is to the first son; first, for the word son is not a word of limitation but of purchase, because it does not include the whole inheritable blood of either species of estates known to the laws of England. So here, heirs of the body are not words of limitation but of purchase, when we are ascertaining this previous question, for the very same reasons; they do not include the whole inheritable blood on whom any estate of inheritance is descendable.

The rule, therefore, is, when by the words the same persons are called to the succession in the same manner as when called by the law, they claim in the character of heirs, and must take in the quality of heirs, and when not, they take as purchasers.

I am glad that we are relieved from deciding on the meaning of the words heirs of the body, or heirs general when applied to personal property. The question in the abstract does not appear to be settled in England. The opinion expressed by Lord *Alvanley* in *Ves. Jun.*, I think is the better one, that they mean heirs *quoad* the property. It is true that many cases may be found where it is said that they mean children, issue, descendants, next of kin, and the like. But this meaning is given to them in reference to the particular case then under consideration, as where the contest is between the eldest son and heir at law and the other children. There it was said they mean children to include the whole, for they are heirs *quoad* the property; also where they were construed children to prevent the operation of the maxim *nemo est hæres viventis*, and the like. There is one case decided (253) by Sir *Thomas Clarke*, Master of the Rolls, in which it was adjudged that they meant children, in exclusion of grand-children; but I do not find that this case

is followed; it is not so much as noticed by Lord *Alvanley*, and it appears to me to be a strange decision; but there was a reason given for it, but a very poor one. The estate was devised to the heirs of the body of A, and to the children of B. Sir *Thomas Clarke* took hold of the word children of B to exclude the grand-children of A. If necessity required it, I think he ought to have reserved it. But in this case we are relieved from the consideration of the question, for the devise certainly intended the property to be kept together, and to go over together; and there is nothing improper to use a word proper to designate a person in regard to real property, to point out a purchaser of personal property. It is true that the deviser could not make it descend as real property; but because we cannot effectuate his intent in toto, it is no reason that we shall not do it in part; and by these words we are carried to persons to take by a certain designation, for the statute of 1784 has not destroyed the *meaning* of the words heirs of the body; they still designate those lineal descendants on whom an inheritance devolves so far as regards designating a purchaser. But it was argued, why not take its meaning with respect to personal property as regards both species, as they are to be kept together, and carry both estates to the heir *quoad* the personal estate? The answer is, the words heirs of the body are more appropriate to real estate; it is there technical, in the other it is more uncertain, and we are left in some measure to conjecture. Besides the real estate is the most worthy, and if both estates are to go together, its word of designation shall be preferred.

I therefore think that the complainant's mortgage had nothing in the property when the mortgage was made, and that the other children, not claiming under him, will not be affected by his transfer. The bill must therefore (254) fore be dismissed with costs.

HALL, Judge.—I think the interest intended by the testator for the heirs of the body of *John* and *Parthenia Wyatt* is contingent, and does not vest in them until the death of their mother, who survived their father, and that then they take as purchasers.

I think the words *heirs of their bodies lawfully begotten*, are a description of the persons intended to take; because

the words *equally to be divided between them, to them and their heirs forever*, give them a fee simple, and if they have a fee simple, they do not take it because they are the heirs general of their father and mother, but because the testator by using those latter words has given it to them. If then they have a fee simple by those latter words, they take nothing by the words *heirs of their bodies, &c.*, as used in a technical sense; the only office of those words must be, to ascertain, at Mrs. Wyatt's death, the persons who shall be entitled to take; before the happening of that event, it cannot be done, for *nemo est hæres viventis*.

We have been urged to consider the words heirs of the body, as issue or children, in order to let the property vest. But I cannot discover in the will any clause that justifies a departure from the words used by the testator; it is not likely that he intended that the children of John and Parthenia should have any control over the property before they got it into their possession. I therefore think that the real and personal property in question did not vest in William Wyatt during his life, and of course he conveyed nothing by the deed which he executed to the complainants. But there is another view of this case taken by my brother HENDERSON, to which I altogether subscribe, which leads to the same result; and that is, that the words *heirs of the body* gives an estate in fee by purchase, although there is an estate for life to the parent preceeding it; (255) because *heirs of the body* are not *heirs general*, and our law, since estates tail are done away, recognize none as heirs except such as can inherit collaterally as well as lineally; and that, although where there is an estate for life to the parent remainder to his heirs, both estates unite in the parent under the operation of *Shelly's* case; yet there can be no such union where the remainder is to heirs of the body; our law knows of no such heirs, of course they are words of description, and those that take under them must take as purchasers. In England the case is otherwise, because heirs of the body are recognized as heirs, they can inherit as such.

I also think, for the reasons given by Judge HENDERSON, that the personal estate in this case is to be governed by the same rules of law as the real estate.

Cited, Leathers v. Gray, 96 N. C., 548; S. C., 101 N.

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C., 162. *Questioned* and held doubtful authority, *Nichols v. Gladden*, 117 N. C., 497.

HENDERSON. et al. v. STEWART et. al.

From Wake.

The purchase money of land unpaid, is a lien on the land where no conveyance has been made of it, unless there is evidence that the land was not looked to, or such lien has been abandoned. When, therefore, A purchased real estate, and a conveyance was to be made when the purchase money was paid, the vendor has a lien on the land for the purchase money; and A having afterwards mortgaged the premises to B, and B having paid the purchase money, he may *tack* the money paid to the sum due on the mortgage; for the payment is for A's benefit, it discharges the lien, and enables him to demand the legal title.

Under ordinary circumstances, the purchaser from a mortgagee stands in his place, and must submit to a redemption on the same terms; for though he may purchase for a large sum, and though he has the legal title, yet he has not equal equity with the mortgagor, for he buys *with notice*; his title being on its face for the security of money, should put him on inquiry; and any thing which puts one on inquiry is sufficient notice.

There are cases, however, where a different rule prevails, as where the purchaser advances the money and takes a conveyance for the benefit of the mortgagor or his heirs, and not for his own benefit. But, as in this case, the defendant took an *absolute conveyance* to himself, and in his answer *denied* complainant's *right to redeem*, he must be viewed as a mere assignee of the mortgagee, and must submit to a redemption on the same terms, and is not entitled to the sum which he has actually advanced.

The bill stated, that one *Peter Casso*, being seized in fee simple of a lot of ground in the city of Raleigh, by deed dated December 23, 1800, mortgaged the same to one *Moore*, a merchant of Petersburg, to secure the payment of \$2,814 12; that *Casso* made large payments to *Moore* at different periods during his life, and afterwards to his executor; that *Moore* died in the year —, after devising the lot aforesaid to his son and heir at law, *Archibald Moore*, and appointed one *Bowden* his executor; that *Peter Casso* afterwards died in 1811, leaving a wife and several children, among whom was *Mary*, the wife of *Alexander Lucas*; that administration on the estate of *Casso* was granted to *John Hodges*, as being the highest creditor of *Casso*, and the personal assets being insufficient to satisfy the demand of *Hodges*, he proceeded regularly

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against the real estate of *Casso*, and at August term, 1816 of Wake County Court, obtained a decree against the heirs of *Casso*, to be satisfied out of the real estate, descended, for 134*l.* 7*s.* 6*d.*, a *fi. fa.* regularly issued thereon to the sheriff of Wake, who levied on and sold the lot aforesaid to *Alexander Lucas* for \$625, whereby the absolute right of and to the inheritance and equity of redemption in said lot became vested in *Lucas*.

The bill further stated, that *Lucas* was indebted to the complainants in the sum of \$5,000 by bond; and to secure this debt, he conveyed the lot before mentioned, in trust, to satisfy the same; and the trustees, in pursuance of their authority, sold the same, when the complainants became the purchasers, and took a deed in fee simple from the trustees.

The bill further stated, that the sheriff of Wake had neglected to make a deed to *Lucas* at the time of his purchase under the execution of *Hodges*, and that *Alexander Lucas* died without ever obtaining any conveyance from the sheriff; that *Moore*, in his lifetime, and *Bowden* his executor since his death, had received from the rents and profits of said lot, large sums, which not only kept down the interest, but nearly extinguished the principal.

That in the year 1814, the defendant *Stewart*, pretending to have purchased the interest of *Moore* for a valuable consideration, and to be assignee of the same; or pretending to be agent for *Bowden* the executor, or *Archibald Moore* the heir at law, entered upon and hath ever since continued to occupy the premises, receiving therefrom large rents and profits, whereby the whole debt has been extinguished. That the complainants had often applied to the sheriff for a deed, and to *Bowden*, *Archibald Moore*,

and *Stewart*, the defendant, in a friendly manner, (258) exhibiting to them their title, and requesting them to come to an account and settlement of what remained due on the mortgage, which requests were denied on divers pretences; and complainants now offered in their bill to pay whatever might be due on the mortgage, and prayed to be permitted to redeem.

The defendant *Stewart*, submitted whether, under the facts disclosed by complainants, they could be permitted to redeem; and stated in his answer, that *Casso* in 1800

became indebted to *Moore* in the sum before mentioned, and executed the mortgage deed as set forth in the bill; that *Moore* was under the impression and belief that there were liens on the lot prior to his, particularly one held by *Hamilton*, the British agent, and he accordingly purchased *Hamilton's* claim for \$1,100; that *Moore* died as stated in the bill, having devised the lot to *Archibald Moore*, his son; and that *Casso* continued in possession of the premises until 1808, when he left the state, his wife and family still remaining in possession; that in 1811 *Casso* died, and his family continued in the occupation of the lot until 1814, when *Archibald Moore* came to Raleigh to adjust the claim against *Casso*; that Mrs. *Casso*, the widow, applied to the Hon. *H. Potter*, as her friend, to liquidate the account, and accordingly he and *Archibald Moore* did settle the account, and ascertained the balance up to June, 1814, to be \$4,178, due *Moore*; that *Moore*, was anxious to close the business, but expressed his desire to consult the convenience of Mrs. *Casso*; that Mrs. *Casso*, whose daughter *Stewart* had married, seemed much distressed, and intreated the defendant to advance the sum found to be due on the mortgage, that her friends joined in her solicitations, but this defendant declared his inability to raise so large a sum, when *Archibald Moore*, influenced by feelings of kindness towards Mrs. *Casso*, agreed to release a part of his claim, and consented to receive \$3,500, which the defendant *Stewart* paid him, and *Moore* then executed a deed to Mrs. *Casso* and her heirs for the lot that not long (259) after Mrs. *Casso* conveyed the lot to *Stewart*, but that she remained in possession as the tenant of *Stewart* until 1817, with the exception of a store-house which *Stewart* placed on the lot in 1814, the actual possession of which, by himself or his tenants, *Stewart* had had for more than seven years; that *Lucas*, immediately after Mrs. *Casso's* death, took possession of the dwelling-house, and kept it until he died. Defendant admitted the sale under the execution of *Hodges*, and the purchase by *Lucas*, but averred that the purchase was avowedly made, not for the benefit of *Lucas* only, but of all the heirs of *Casso*. Defendant admitted the purchase by complainants at the sale under the deed of trust, and affirmed that complainants had then full knowledge of the monies advanced by

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this defendant; that the money advanced by this defendant in discharging incumbrances, and in necessary repairs on the lot, amounted to \$9,469:44; that he had received for rents and profits \$1,981:31.

Defendant farther answering said, that complainants had applied to him for a settlement, that he gladly assented thereto, and offered to relinquish all claim upon receiving his money advanced with interest thereon; that *T. P. Devereux* and *J. F. Taylor*, esquires, were selected to settle the accounts, and Mr. *Taylor*, after the settlement, reported the balance due this defendant to be \$6,889:19; that the complainants admitted it to be correct, and promised to secure the payment thereof to this defendant by a promissory note; that complainants requested this defendant to make a draft for a deed of conveyance, which he did; but on the day appointed for the execution of the deed and receiving the note, the complainant *Henderson* informed the defendant that the matter should be settled by a Court of Equity, declining closing the business, and filed the present bill.

At a former term it was referred to the clerk and master to take an account of the monies due on the mortgage, of monies due the defendant *Stewart* for advances made to relieve the mortgage, and for improvements of a permanent and substantial nature put on the mortgaged premises, and generally of all matters of accounts involved in the cause.

The clerk and master, among other matters, reported, that *Moore* paid to *Thomas Hamilton & Co.* \$1,080:35, on the 4th of February, 1802, in the purchase of a prior claim with which the lot was incumbered; and he charged the mortgaged premises with this sum and interest, and credited *Stewart* by the same amount.

Farther he reported, that the mortgaged premises were bound for the interest on the sum due from *Casso* to *Moore* from the 23d of December, 1803, the time fixed in the mortgage for the payment of the money, though the mortgage deed was executed the 23d of December, 1800. He reported also the value of the improvements made by *Stewart* at \$2,500.

To the report exceptions were filed, for that the money paid to *Hamilton & Co.* should not be taken into account,

and could not be tacked; and also for that the improvements put on the mortgaged premises was valued at more than they were worth.

From the testimony in the cause it appeared that *Casso* had contracted for the purchase of the lot from one *Alford* and gave his bond for the purchase money, but received no title from *Alford*; he afterwards mortgaged the lot to *Moore* and *Hamilton* became assignee of the bond given to *Alford*.

The cause was argued upon the exceptions, by *Badger* for complainants, and *Gaston*, contra; when HENDERSON, Judge, delivered his opinion as follows:

Without deciding on the right of the mortgagee to tack to the mortgage money other demands of a personal nature which he may have against the mortgagor, and if he can as against the mortgagor, whether such right is extended (261) against an assignee for value, of the equity of redemption, and whether a purchaser of the equity of redemption, at a sheriff's sale, is such an assignee, I am very clearly of opinion that the mortgagor *Moore* has, in this case, the right of tacking the money paid to the *Hamiltons*; because I think it was an incumbrance, and a lien on the land, and which prudence dictated to him to remove to give efficacy to the mortgage.

I give no opinion whether the purchase money after title is made forms such lien; but I think it clearly does where title is not made, unless it appears that such lien was not relied on or abandoned; as if by the agreement title was to be made at a period before the purchase money became due. In this case it appears from the evidence that *Casso*, the mortgagor, had contracted with *Alford* for the purchase of the lot, which he afterwards mortgaged to *Moore*; that he gave his bonds for the purchase money, with *John G. Blount* as security, but did not receive title to the land; that these bonds were transferred by *Alford* to *Hamiltons*. *Casso* could not compel *Alford* to make title until these bonds were paid off. *Moore*, therefore, by paying off these bonds, destroyed this equitable lien and enabled *Casso* to call for the legal title. It was done for *Casso's* benefit, it thereby enabled *Casso* to fulfill his

warranty to *Moore*. This exception must therefore be overruled.

I think the clerk erred in not allowing interest from the date of the deed, notwithstanding the deed calls for only the net sum at the end of three years, for the parties treated the contract as a conditional sale, and the rents were to come in lieu of interest; but the parties in 1814, and this Court now, considers it only as a security for money. *Moore* should, therefore, have interest on his money then due.

Although, under ordinary circumstances, the assignee of the mortgagee, should stand in his place, and must submit to a redemption upon the same terms; and (262) though, in general, it be true that it is no defence for him to say, that the payments or other deductions claimed by the mortgagor do not appear upon the papers, because it is enough that it appears that it was redeemable, and it was his own act to purchase, and he might have informed himself, for the assignment only substitutes him to the mortgagee; yet there are cases where the sum really paid by the assignee shall be paid before a redemption shall be allowed, even when the mortgagor has been entirely passive; when he has lent his aid to swell the amount, there is no doubt that such will be the case. Such cases are when the mortgagor is an infant, or perhaps a feme covert, and is about to be turned out of possession, or to suffer injury, and one as a friend, and in order to preserve the mortgagor's rights and save him from injury, *bona fide*, advances money; and in this case, but from the assignee's taking an absolute deed to himself, and in his answer denying the right of the heirs to redeem, I think this would have been such a case: the more especially as he paid several hundred dollars less than the respectable gentleman who drew the mortgage deed reported to be due, after having examined the case as the friend of, and at the request of the widow; but his taking an absolute deed and denying the right of redemption, shows too strongly that he was not acting on the part of or in behalf of the heirs of the mortgagor, but for his own benefit; he must therefore stand upon the rights of the mortgagee. I should have mentioned above, in addition to the circumstances there stated, that *Cusso* had left his wife and chil-

dren without affording them means of redemption, or any other place of residence, and I regret very much that I am compelled to view the assignee as acting for his own benefit, and not for that of the heirs; but I am not satisfied how the report of the master differs so much from the gentleman who settled the account in 1814. Justice requires, I think, that we should be informed, if possible, of the items of that settlement; I think the case should be referred to the master to ascertain them.

(263) I think that the master erred in fixing the value of the improvements; the evidence warrants no farther than \$1,800 at most. If the master went to the grounds that the improvements yield annually such a sum as, according to common calculations, requires an expenditure of \$2,500 to be made, he overlooks the ground rent, which belongs to the mortgagor. As to the assignee standing (in ordinary cases) in the place of the mortgagee, I think that the rule is as laid down by Lord *Rosslyn*, and approved of by Lord *Eldon*, he can claim no greater rights; and that the rule laid down by Lord *Kenyon* is fallacious, for although he has the law on his side by obtaining the legal title from the mortgagee, he had not equal equity; he is not a purchaser without notice; for his title being for the security of money, he is thereby put upon inquiry as to the sum due; and that which puts a person on inquiry is sufficient notice.

There is another and very important point, which I wish to have brought before the Court; it is alleged in the answer and supported by proofs; and that is, whether *Lucas* did not become, upon his purchase, a trustee for the heirs of *Casso*? I wish that question to be reserved and spoken to.

The other Judges concurred in the opinion of Judge HENDERSON, and it was decreed that the lot be sold by the master, reserving the cause for farther consideration of the points on which his honor Judge HENDERSON expressed a wish for farther examination.

Cited, Pullen v. Mining Co., 71 N. C., 563.

CASES
ARGUED AND DETERMINED IN THE
SUPREME COURT
OF
NORTH CAROLINA.

JUNE TERM, 1826.

SELBY *v.* CLARK.

From Beaufort.

Proof of the hand-writing of a subscribing witness, under a *temporary* absence of the witness without a change of domicile, shall not be received, for it might lead to great abuses: but where a witness leaves the State in the exercise of a public duty (as in the case of a member of Congress) all presumption of collusion is repelled, and his hand-writing may be proved.

This was an action of trespass on the case, tried before RUFFIN, Judge. On the trial, it became material for the plaintiff to give in evidence a bill of sale for a slave, to which *Richard Hines*, Esq., was the subscribing witness; it had been heretofore proved and registered upon the testimony of the subscribing witness.

Mr. Hines had been elected a representative of the district to which Beaufort County belongs, and at the time of trial, was at Washington attending his public duties as a member of Congress; but was not there, with any intention of changing his domicile from this state.

The suit had been pending for several years, but *Mr. Hines* had never been summoned as a witness in it, (266) nor had any attempt been made by the plaintiff to obtain his deposition.

The plaintiff offered to prove his hand-writing, and on such proof claimed to read the bill of sale; but the Court

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refused to allow it, and a verdict was given for the defendant. The plaintiff moved for a new trial, because the evidence was not received, and the Court (by consent of parties, and in order that the rule of evidence might be settled) overruled the motion, and gave judgment for the defendant; whereupon, there was an appeal to this Court.

Badger, for the appellant.—The presence of the subscribing witness is required, merely to rebut the presumption which arises from his non-production, that the party is *afraid* to produce him; hence, when it is made apparent that the true reason of his non-production, is not the fear of his testimony, secondary evidence will be received. It is certain, that the hand-writing of a subscribing witness, who has *permanently* removed, may be received; now we affirm, that whether the removal be permanent or temporary, is of no moment; that the true enquiry is, whether at the time of the trial, the witness is absent beyond the jurisdiction of the Court, out of the reach of its process; if he be, secondary evidence is admissible.

Thus, in the case of *Prince v. Blackburn* (2 *East*, 250), the subscribing witness to a deed was abroad, at the time of trial, the Court held, “that as the witness was out of the jurisdiction of the Court, so as not to be amenable to its process,” evidence of his hand-writing was proper. The case leaves it uncertain whether the absence of the witness was temporary or permanent, but the Court seems to have considered it unimportant, for they take no notice of any distinction between the absence for a limited time, and a permanent residence abroad.

So, in the case of *Crosby v. Percy* (1 *Taunton*, 364), a temporary absence of the subscribing witness is pre-(267) supposed, and all that the Court required to admit secondary evidence, was to be satisfied that an honest effort had been made to get the subscribing witness, that he was not designedly kept back.

And in *Ward v. Wells* (1 *Taunton*, 461), where the absence seems to have been temporary, the Court appears to have decided the case on an enquiry whether the witness was out of reach of process.

To the same point is *Adam v. Kers* (1 *Bos. & Pul.*, 360).

The same rule exists in several of the sister states. (5 *Mass.*, 462; 11 *Ibid.*, 309.) In this latter case, the witness *resided* in New-York. *Parker*, J., says, "the witness being absent and out of the Commonwealth," secondary evidence must be received, and he assigns no other reason for it. In South-Carolina, *Oliphant v. Taggart* (1 *Bay*, 355). So in North-Carolina, *Allen v. Martin* (1 *Car Law Rep.*, 373), when it appeared that the witness lived in South-Carolina; he was out of the reach of process, and secondary evidence was received.

To this it may be added, that the rule for which we contend, in England, to be distinctly recognized, and not to admit of controversy; for *Peake*, in his Treatise on Evidence, states, in so many words, that if a subscribing witness be absent at the time of trial, "whether for permanent residence, or temporary purpose," proof of his hand-writing will be received, and for this he cites *Prince v. Blackburn*, before referred to. We may hence conclude, that the understanding of the profession in England, as to the ground of decision in *Prince v. Blackburn*, supports the view which we have taken of the case.

But it is said, that *Mr. Hines* was not summoned, nor was any attempt made to procure his deposition.

He was not summoned, nor is the service of a subpoena in *any* case necessary to authorize the introduction of secondary evidence; but still less, if possible, is it here necessary, where the very ground on which a motion is (268) made to introduce the secondary evidence is, that the witness is not bound to obey a subpoena. Service or attempt to serve a subpoena, is often shown to the Court, but it is only to evince that a party has used due diligence.

As to not taking his deposition, there is no law which requires that an attempt should be made to take it before proof of hand-writing can be received. If there was, many of the cases in the books, on the admissibility of proof of hand-writing, where the residence of subscribing witness was known, would have presented no difficulty, they would have been disposed of on that ground. But the case of *Allen v. Martin*, before cited, has settled the question here, for it is one of the points on which the case came up.

But it may be said, that this case is to be settled by an act of 1792, relative to registration of bills of sale of slaves.*

The act was not intended to alter any of the rules of evidence, but to prescribe the circumstances under which a party may be excused, both from the production of the subscribing witness, and proof of the hand-writing, and to declare when the probate and registration shall be taken as plenary proof. Suppose a subscribing witness be insane, the act does not in such case, say that the instrument may be read on probate and registration, yet surely the Court would permit it.

The phrase "removed out of the state," can mean only such an absence as prevents the party from producing the witness. So in the case of a deposition *de bene esse*, (269) it is secondary evidence. Suppose that the witness is absent at the time of trial, but will return in ten days, the Court does not wait for the witness.

Hogg, contra.—At the common law, a subscribing witness must be called, unless he be dead, out of the Court's jurisdiction, insane, infamous, interested, or, upon diligent search, not to be found; in which cases, his hand-writing may be proved.

The act of 1792 has so far altered the common law, that in cases of death and removal (by which latter word is meant, a change of domicile, not a temporary absence) probate and registration may be received as proof of execution; and the act seems to me to settle the question.

But if the case depends on the common law authorities, there can no case be found, where a subscribing witness, absent for a limited time, the period of whose return was certain, and not distant, has been dispensed with. By a continuance of the cause, his examination *viva voce* might be had, before his departure his deposition might have been taken, and in either case, the appellee would have had the benefit of a *cross-examination*.

* *Be it enacted, &c.* That on all trials at law, where a written transfer or conveyance of a slave or slaves shall be introduced to support the title of either party, the due and fair execution of such writing shall be proved by a witness subscribing and attesting the execution of such writing; but if such witness shall be dead, or removed out of the State, then the probate and registration of such writing may be given in evidence.

The general rule is of importance, the exception is matter of convenience; that a party who is in no fault, but has used all due diligence to procure his witness, shall not lose the benefit of his deed. The cases of exceptions are all well arranged in a note to 4 *East*, 55, Day's edition.

In *Prince v. Bluckburn*, the return of the witness was uncertain; in our case, the return of *Mr. Hines* at a definite time, is certain.

In *Ward v. Wells*, enquiry had been made for a year, and witness could not be found; he was on a voyage to Spain, and his return was uncertain. The case justifies the belief that his absence was permanent. In (270) *Sluby v. Champlin* (4 *Johns. Rep.*, 467), the witness had been *long* absent, and when last heard of was at Leghorn.

In cases of witnesses being absent, and out of the jurisdiction of the Court, it has, on the one hand, been contended, that the witness should be domiciled abroad; and on the other, that it need only appear he was out of the reach of process at the time of trial, to let in secondary evidence of his hand-writing. The truth lies between the two extremes. If there is no certainty of the return of an absent witness within the Court's jurisdiction, proof of his hand-writing is received *ex necessitate*. It is not easy to lay down an inflexible rule for all cases, but the Court will take care that the one party shall not lose his rights under a written instrument, when a witness cannot be procured; and that the other party shall not lose his cross-examination where his adversary has it in his power to take a deposition, or continue his cause to get the witness.

Thus in 18 *Johns. Rep.*, 60, the proof of hand-writing was not admitted, when the deposition of the witness could be procured.

Here, the testimony of *Mr. Hines* was completely within reach of the appellant; he could not have had a continuance for his absence, for he never summoned him to attend, nor did he attempt to take his deposition before he left the state. It would be strange, that the diligence of the appellant was not such as would entitle him to continue and yet was sufficient to let in secondary evidence. If the cause was continued, the appellee sustained a little delay, and possibly some costs; by admitting the secondary evi-

dence, he loses the cross-examination, and is subjected to no small hazard of having a fraud practiced on him. He can neither prove the facts attending the delivery of the deed, nor, what is often all-important, *the time* of delivery. If the rule is to be relaxed to the extent that a party need not produce the subscribing witness, because it would (271) oblige him to continue, it had better be abrogated altogether.

Gaston, on the same side.—The rule anciently was, that a deed must be proved by the subscribing witness, if living; if dead, proof of the fact and of his hand writing, was received. (*Com. Dig. Evidence*, B. 3; —10 *Coke* 93, a. 2 *Atk.* 48.)

Necessity has, of late years, and since the American Revolution, induced a relaxation of the rule. The earliest innovation is the case of *Coghlan v. Williamson* (*Doug.* 93). The subscribing witness had gone to India five years before, and defendant had acknowledged the debt, but declared that plaintiff never could get the witness. Evidence of hand-writing was received *ex necessitate*. This was in 1779. In 1797, *Lord Kenyon* declared, that the relaxation, though very modern, had not extended beyond the case where a witness was domiciled abroad, or could not be heard of (7 *Term R.* 266); and thus far, the Courts have adopted it. (1 *Law Rep.*, 375; 2 *Hayw.*, 404.)

But subsequent Judges have further relaxed the rule. They have never, however, gone farther than this, that even if a witness be not *domiciled* abroad, but is abroad, and every exertion has been made, but without success, to get his testimony, then the Courts admit secondary evidence.

In *Prince v. Blackburn*, the witness left the country, *before action was brought*, he was never amenable to its process; and proof of his hand-writing was received on the same equitable principle on which the depositions of witnesses domiciled abroad had been received.

In *Adams v. Kers*, the witness resided permanently in Jamaica, and had never been amenable to process after suit brought.

So in the cases read from *Taunton*, 364 & 461, the relations of the old rule were introduced from *necessity*.

The modern rule contended for, on the other side, does not seem to have been perfectly settled, even so late (272) as 26 *Geo.*, 3 (1786-7), for in that year, a statute was passed as to bonds executed in the East Indies, and witnessed there, declaring that proof of the hand-writing of the subscribing witness, of the party to the deed, and of the residence of the witness in India, shall be sufficient proof of the bond. But the enquiry is, not what is the English rule, but what is ours; it is the same that *Lord Kenyon* held in his time. Any further relaxation here is unnecessary, and of course illegal; unnecessary, because depositions *de bene esse* may be taken in every instance, and the witness compelled to attend. But in England, no decision can be found, that where the witness resides there, is known, and with the knowledge of the party is about to be absent, and is not summoned, that if absent at the moment of trial, his testimony may be dispensed with.

In *Gordon v. Paine* (*Martin*, 72), the witness was resident in the State, but at the time of trial was absent in New-York and sick, proof of his hand-writing was not received. See also 5 *Cranch*, 15--8 *Johns. R.*, 121. Here the witness lived in the adjoining county, the cause had been pending for years. Plaintiff knew that the witness would be out of the State at the trial, and he made no effort of any sort to get his testimony.

The true rule is to be found in our act of 1792; the exceptions to the general rule made by the act, are in cases of death or removal. This case comes not within the meaning of the word *removal*, it implies a permanent change of residence; it comes not within the equity or spirit of the law. Where there is a physical and legal power to compel testimony, secondary evidence is not admissible. This is the spirit.

TAYLOR C. J.—The general rule, which requires the proof of a bond to be made by the subscribing witness, has undergone various relaxations, the first of which seems to have occurred in *Coghlan v. Williamson*, 1 *Doug.*, (273) 93, which was certainly a strong case, since besides the impossibility of obtaining the attendance of the witness, there was the defendant's admission of the debt. The rule which now appears to be established in England

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is, that the secondary evidence is admissible, where the witness is out of the jurisdiction of the Court, so as not to be amenable to its process. I do not recollect any practice in this State which authorizes a proof of the hand-writing under a temporary absence of the witness, and without a change of domicile, which I think it would be dangerous to establish, on account of the abuses to which it might lead. For a subscribing witness who might alone be conversant of the corrupt consideration of a bond, might be sent over the line to suppress all proof except that of the execution. But where a man leaves the State in the exercise of a public duty, as in this case, as all presumption of collusion is thereby repelled, justice ought not to be delayed or interrupted by his absence. I think therefore, it may fairly be considered as coming within the reason of other admitted exceptions to the rule, and that there ought therefore to be a new trial.

HALL, Judge.—If the defendant could not have dispensed with the testimony of the witness *Hines*, it would have been incumbent on him to have taken his deposition, because he could not procure his personal attendance. The witness being absent in the discharge of duties imposed upon him by law, so far resembled a witness whose place of residence was without the limits of the State; of course, his deposition might have been taken, if the party had thought proper to do so; but he was not obliged to do so, because it is a rule of evidence in our Courts, that the hand-writing of a documentary witness may be proved, provided he lives without the limits of the State. I therefore think, that the rule for granting a new trial should be made absolute.

HENDERSON, J., concurring,

Judgment reversed.

Approved. *Edwards v. Sullivan*, 30 N. C., 302; *Miller v. Hahn*, 84 N. C., 226.

THE GOVERNOR, to the use of Holcomb, v. FRANKLIN AND OTHERS.

(274)

From Surry.

If a Constable sue out a warrant, obtain judgment thereon, and receive the amount thereof from the Defendant, *without an execution*, and fail to pay over to the Plaintiff the amount received, the securities of the Constable are liable to the Plaintiff, notwithstanding he received the money without having an execution.

This was an action of *debt* on a constable's bond, brought against the defendants, as securities to one *Martin*, a constable of Surry; and was tried before DANIEL, Judge. The condition of the bond was in these words:

"The condition of the above obligation is this, that whereas the above bounden Joseph Martin was duly appointed a Constable in Jonesville district, in the county of Surry; now if the said Joseph Martin shall well and truly pay, unto the person or persons properly authorized to receive, all monies which he may collect by virtue of said office, and shall faithfully execute all process which may come into his hands as such, and true returns make thereon; and furthermore shall well, truly and faithfully, in all and singular, discharge the several duties belonging to his office as such, according to law, during his continuance therein; then the above obligation to be void; otherwise to remain in full force and virtue."

The facts were, that *Holcomb* placed in *Martin's* hands a note to collect; and took a receipt for it. This note had been made by *Joseph Harrison* and *Daniel Marrion*, payable to *James Waugh*. The constable obtained a judgment against *Harrison* and *Marrion*, and execution was stayed; after the stay expired, the constable having the judgment in his hands, but no execution having issued thereon, received the amount of the judgment from *Harrison* and *Marrion*, and failed to pay it over to *Holcomb* on demand.

The present action was then brought, and on the trial, plaintiff offered to prove the admission of the constable,

Martin, that he had collected the money; this was (275) objected to, on the ground, that by the terms of the condition of the bond, the securities thereto were not bound unless the plaintiff showed an execution authorizing the collection of the money. The Court overruled the objection, and received the evidence; and instructed the jury, that if the constable collected the money in his official character, having a judgment for the same,

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though without execution, then the securities were liable, notwithstanding the condition of the bond did not specify and embrace the express terms of the act of 1818.

Defendants further objected, that as the debt appeared to have been originally due to *Waugh*, and there was no other evidence of *Holcomb's* having an interest therein than the mere fact of his having taken a receipt from *Martin* in his own name, that the suit should have been brought to the use of *Waugh*; but the Court held otherwise, and the plaintiff had a verdict. Defendants moved for a new trial, which was refused, and from the judgment rendered, there was an appeal to this Court.

TAYLOR, C. J. —No formal condition for a constable's bond is prescribed by the act of 1818, c. 980, but the general direction is, that it shall be conditioned as well for the faithful performance of his duty as constable, as for his diligently endeavoring to collect all claims put into his hands for collection, and faithfully paying over all sums thereon received, either with or without suit, unto the persons to whom the same be due.

The material words of the condition of this bond are, "that if the said *Joseph Martin* shall well and truly pay unto the person or persons properly authorized to receive all monies which he may collect by virtue of said office." If a constable is employed to collect money, and he does so without suit, he collects it by virtue of his office, because it is the general understanding that he is to bring suit only in the event of its being necessary, and the general words of this condition embrace monies collected with or without suit. But here a suit was brought, and (276) judgment recovered; and I think the spirit of the act, not only gave him a right to receive it without execution, but bound him to do so, if the debtor had tendered it; for why harrass a man with an execution, who is prompt to pay without one? The act contains a recognition of the universal practice of the country, for constables to be employed as collectors of sums within a justice's jurisdiction; and seems designed to prevent sureties from escaping from their responsibilities, because their principal, when he received money he was employed to collect, was unarmed with legal process.

On the other question, *Holcomb* being in possession of the note, had *prima facie* a right to receive the money, and the constable receiving it from him for collection, admitted that right, and engaged to pay him the sum when collected. It is a common practice to sell notes without endorsement, and if constables were not bound to pay the money to the persons from whom they received them, it would lead to great abuses.

My opinion is, that the judgment ought to be affirmed.

HALL, Judge.—The act of 1818, c. 980, declares, “that the bond given by the constable shall be conditioned as well for the faithful discharge of his duty as constable, as for his diligently endeavouring to collect all claims put into his hands for collection and faithfully paying over all sums thereon received, either with or without suit, unto the person to whom the same shall be due.” The bond on which the present suit is brought is conditioned that *Martin*, the constable, “shall well and truly pay unto the person or persons properly authorized to receive, all monies which he shall collect by virtue of said office, &c., and furthermore, shall well, truly and faithfully, in all and singular, discharge the several duties belonging to his office as such, according to law.”

The act makes it his official duty to collect all sums put into his hands, with or without suit—a judgment (277) had been obtained in this case through his agency, he received the money due upon it. I think he received it in his official character; it was not necessary to apply to the justice for an execution, provided the defendant was willing to pay it without one.

I think the condition of the bond also covers this case, because in that bond the securities have stipulated that he shall pay all monies which he shall collect by virtue of his office. I also think that suit was properly brought to the use of *Holcomb*, under the act of 1793, c. 384, for he was the person injured, and the person authorized on that account by the act to bring suit. I think the rule for a new trial should be discharged.

HENDERSON, Judge, was of the same opinion.

Judgment affirmed.

Approved. St. v. Corpening, 32 N. C., 58.

HUNTER v. KIRK.

HUNTER v. KIRK.

From Mecklenburg.

The return of a Sheriff of the service of a writ is made upon oath, and cannot be contradicted by the Defendant's affidavit that the writ was not served. When, however, a Defendant, against whom a judgment by default had been rendered, obtained a *Certiorari*, and swore that the writ had never been served, and *that he had a good defence*, the *Certiorari* will not be dismissed, but a new trial shall be had.

Kirk sued out a writ against *Hunter*, the plaintiff, returnable to August Term, 1824, of Mecklenburg County Court. The sheriff returned this writ "executed," and a judgment by default was taken. At the next term thereafter a writ of enquiry was executed, and the jury assessed plaintiff's damages to \$81 and costs. An execution was issued thereon, and was returned satisfied.

On the 30th of March, 1826, *Hunter*, sued out a writ of *Certiorari* to Mecklenburg Superior Court, and when the cause came on to be heard before DANIEL, Judge, the (278) affidavit of *Hunter* was read, stating that the writ never was served on him, and further, that he believed he had a good defence, but could not avail himself of it before, because he was ignorant that there was any suit pending against him. The affidavit of the sheriff was also read, stating, that to the best of his knowledge the writ was served, and that he never had returned any writ as executed by himself which he had not actually served.

Judge DANIEL dismissed the *Certiorari*, and ordered a *Procedendo* to the Court below—whereupon, *Hunter* appealed.

HALL, Judge, delivered the Court's opinion.

Although the sheriff does not swear positively to the execution of the process, yet he states that he verily believes he did execute it. Indeed he is a sworn officer, and his return cannot be contradicted by the defendant's affidavit.

But the defendant states, that he believes he has a good defence to make, on behalf of his intestate, that he did not make it, because he was ignorant that any suit was depending against him. I think the ends of justice would be

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better answered by granting a new trial, than by dismissing the *Certiorari*.

We are therefore of opinion, that a new trial should be granted.

Judgment reversed.

Approved. Lunceford v. McPherson, 48 N. C., 174;
Mason v. Miles, 63 N. C., 564.

Doe on dem. of BARDEN v. M'KINNE.

(279)

From Wayne.

A levy on *chattels* vests in the Sheriff a special property, and he may therefore sell after the return day of the writ, without a *ven. ex.*, but a levy on *land* gives to him neither property, nor a right of possession; he has a naked authority to sell only; his sale transfers a right of property to the purchaser, and without the consent of the tenant the Sheriff cannot give actual possession.

Therefore, a sale by a Sheriff of real estate, after the return of a *fi. fa.* and without a new writ, is made without authority, and passes no title.

It seems that a levy on real estate shown only by an endorsement on the writ, made after the return day, is not valid.

Ejectment, tried before RUFFIN, Judge. Plaintiff claimed title to the lands described in his declaration, as follows: *George Bladbury* recovered a judgment in Wayne County Court, at May Term, 1820, against the defendant *William M'Kinne*, for \$1,096 33, with interest thereon and costs, on which judgment a *fi. fa.* issued, tested of May Term, 1820, returnable to the succeeding August Term: this was delivered to the sheriff on the 27th of May, 1820; upon which writ (it never having been returned, nor any other execution having been issued on said judgment), the land in dispute was sold to the lessor of the plaintiff for one dollar, on the 31st of January, 1822, and the sheriff executed a deed.

George Bradbury died in October, 1820, leaving a will, of which *Barden*, the lessor of the plaintiff, is executor; the will was proved at November Term, 1820, of Wayne County Court, and *Barden* then qualified as executor.

The sheriff who sold under *Bradbury's* execution, was called as a witness for plaintiff, and stated, that between May and August Terms, 1820, he levied the execution on

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the land in dispute, and also on *M' Kinne's* negroes. that he did not then give any notice of said levy, nor endorse it on the execution, until after February, 1821; that in February, 1821, he sold the negroes levied on, which (280) did not fully satisfy the execution; that the lessor of the plaintiff, as the executor of said *George Bradbury*, soon afterwards (but when the witness could not remember) directed him to sell the land, and that in pursuance of such instructions, he advertised the land, and sold it on the 31st of January, 1822. He futher said, that between February, 1821, and January, 1822, he had advertised and offered the land for sale, but did not sell for want of bidders.

Upon these facts, the Court instructed the jury, that the sale of the land to the lessor of the plaintiff on the 31st of January, 1822, upon the *fi. fa.* issued in May, 1820, and after the death of *George Bradbury* in October, 1820, was without lawful authority in the sheriff, and therefore void, notwithstanding any levy thereon, made between May and August, 1820.

There was a verdict for the defendants, new trial refused, judgment and appeal.

Badger, for the appellant.

Gaston, *contra*.

TAYLOR, C. J.—It is not necessary to the decision of this case, to express any opinion as to the levy upon the land; if it were, I should think that the sufficiency of the levy might well be doubted. How, or in what manner it was performed by the sheriff, whether by going to the land, and making a declaration of it, or by a silent and mental volition, does not appear; but it does appear, that no notice was given of it, and that the endorsement upon the execution was made after the writ was dead in law. It would lead to endless abuses, if a sheriff could make a levy, simply by an endorsement on the execution after its force was spent, and the lien arising from the *teste* had ceased to exist, or had yielded its priority to other executions of later *teste*, issued perhaps in consequence of its being returned without any endorsement, and there being no *alias* ordered. It would be hazardous to purchasers, (281) and inconvenient in general, if a sheriff were allowed

to continue the lien of the *teste* by an *ex post facto* indorsement of a levy, where the law permits it to be continued only by *alias* executions, or the revival of the judgment. For if the sheriff retaining the writ in his own possession, may do so, after its force is spent, I can see no reason, why he might not be permitted by the Court to do it, upon an execution returned without a levy, and at a period when the writ had no longer any force.

But admitting that the levy was unexceptionable, the sale to the plaintiff was void for want of lawful authority in the sheriff to sell. It was not merely a purchase under an irregular execution, for that would not impeach the plaintiff's title, but a purchase without any execution. The general rule is, that all process must be served before the return day; and, as to chattels, if the levy be made in due time, the Sheriff may complete the same by sale after the return day. But the reason of this is that the seizure of chattels vests a special property in the sheriff, who may take them into his own possession for the purposes of the execution. From the essential difference in the nature of the property, the operation of a *fi. fa.* issued against land must be different. It gives the sheriff no authority to take possession of the land and turn the defendant out. He cannot break open an outer door to execute a *fi. fa.* against chattels; how then, upon the same writ, can he give possession of a house? A term for years may be sold on a *fi. fa.* or a moiety of land delivered on an *elegit*, yet in neither case can the sheriff give possession. The purchaser and the creditor must obtain possession of ejectment. I apprehend that the sheriff has no right to change the possession of land, nor does he acquire any thing by the levy, but a right to enter for the purposes of the sale. The seisin, the possession and the right of possession, remain in the defendant until the sale, whose dominion continues unimpaired, except as to the *jus disponendi*. This was (282) one effect of the levy, the other was to set apart this land to be converted into money according to the terms of the *fi. fa.* But there must be some lawful authority in existence, for this conversion and sale; the sheriff clearly had none, for his had expired more than twelve months before the sale; and any private individuals might as legally have sold the land as the sheriff did in

this instance. Though the statute of George II. and our act of 1777, have made lands liable to be sold on a *fi. fa.* equally with chattels, yet there are specific distinctions between the two sorts of property, to which even laws must be moulded, in order to be useful. Land cannot be removed, therefore the sheriff incurs no risk after the levy, and possesses consequently no right, except that to enter for the purpose of a sale. After a sale he can give only the legal, not an actual possession, and every purchaser knows that he must resort to an ejectment, unless the defendant is willing to surrender the possession. But with respect to chattels, he cannot even sell them unless they are present, and so completely within his control, as to enable him to deliver possession to the purchaser.

Though I am aware that the statute of 5 George II, c. 7, was professedly intended to enable British subjects in England to sell real estates on execution in the colonies, in order to recover debts due to them, yet this then colony was no sooner emancipated, than she passed a law for the purpose of rendering land liable to debts upon the deficiency of personal assets. Yet I cannot conceive that the Parliament, much less our own Legislature, intended to give to sheriffs the right to take possession of the land upon the levy, at his discretion, to turn the family out of possession, and to retain it himself until the sale. Nor has this been the construction of the statute in any of the colonies, for the defendant is never disturbed, until the sale is consummated, and then only by his own consent, without suit. Judging from the practice therefore

(283) pursued in this state, for no light can be obtained from the British cases, I should think that the proper mode would be to issue a *venditioni exponas* upon the return of a *fi. fa.* levied upon land, and that in no other way, after a levy, can it be sold by the sheriff. I think the judgment should be affirmed.

Approved. Tarkington v. Alexander, 18 N. C., 87; *Smith v. Spencer*, 25 N. C., 256; *Maynard v. Moore*, 76 N. C., 158; *Tayloe v. Gaskins*, 12 N. C., 295.

HAMILTON v. WRIGHT AND PARRISH.

HAMILTON v. WRIGHT & PARRISH.

From Granville.

A Justice of the Peace of Granville County rendered a judgment in Franklin, in an action on the judgment, this fact may be proved, and the Justice is a competent witness.

Justices' judgments are not records, and do not prove themselves; they resemble records in one particular, viz.: their merits are not examinable in an original suit, and assumpsit will not, therefore, lie on such judgments.

It is not proper to permit a special plea to be added after the jury is impannelled.

This was an action originally commenced by warrant, and by successive appeals brought into Granville Superior Court, where it was tried before NORWOOD, Judge.

On the trial, and after the jury had been charged with the cause, the defendant's attorney moved for leave to add a special plea, that the judgment on which the present warrant had been brought, was rendered in the County of *Franklin* by a justice of the county of *Granville*, but the presiding judge refused the leave asked. The plaintiff then produced and duly proved the original warrant, the judgment thereon against the defendant *Wright*, the stay of execution by the defendant *Parrish*, on which the present suit was founded. These all appeared to be perfectly regular; the judgment appeared to have been confessed by the defendant *Wright*.

The defendant then called as a witness, *Anderson Paschall*, the justice before whom the judgment appeared to have been confessed, and asked him where the said (284) judgment was confessed; upon which defendants' counsel being asked to state the purpose and show the relevancy of his enquiry, said that he expected to show by this witness that the judgment was confessed at a place called Plank Chapel, and then by another witness that Plank Chapel was in *Franklin* county.

Plaintiff's counsel then objected to the question put to *Paschall*, and the Court sustained the objection. There was a verdict for the plaintiff, and a motion by defendant for a new trial, 1st, for the refusal to permit the special plea to be added; and 2d, for the rejection of *Paschall's*

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evidence. Motion overruled and judgment rendered, from which the defendant, *Parrish*, appealed.

Manly, for appellant.

Badger & Hawks, contra.

TAYLOR, C. J.—This was an action originating by way of warrant, in a paper purporting to be a judgment rendered by a justice of the peace in the county of Granville. On the trial the defendant offered to plead and prove that the judgment was rendered in the county of Franklin by a justice of Granville; the plea and evidence were rejected, and the propriety of this rejection is now argued on the authority of *Bain v. Hunt*, decided in this Court. But in this case, no question arose as to the proof of the record, it being assumed and admitted throughout, that the judgment of the justice had an authentic existence. The only enquiry was, as to the effect of such a judgment when proved; and every observation and argument tending to show its conclusiveness upon the right of the parties to it, would have been irrelevant, upon the supposition that the judgment declared on, had no existence in point of fact.

In this case, the point in contest is altogether different; it relates solely to the existence of the judgment set up; the defendant does not object to it, because it is unjust, or founded on a misconception of the merits of the case, for these inquiries can clearly never be made in an original (285) suit, founded on the judgment; but because no judgment was given. It is impossible to apply the rules of evidence, established in relation to the authentication of records of courts of justice, to the proceedings before magistrates. They cannot be decided on by inspection, they have no seals, they keep no copies of their proceedings, and the knowledge of their official existence is necessarily confined to the county of their residence. No provision is made by law for the authentication of their judgment, except in one instance; and, in the absence of such legislative provision, the enquiry must continue to be conducted, as it heretofore has been, by proof of the justice's hand-writing either by himself or others, and by proof that the judgment was given by him, then a justice, within the limits of his jurisdiction. All these considerations arise out of the issue to be decided; for if he were not a magistrate

in the county where the judgment was rendered, at the time of its rendition, there is consequently no such record, and the issue is maintained on the part of the defendant.

If the enquiry as to the jurisdiction is excluded, the same rule apply to the exclusion of an enquiry into the official character of the individual who holds himself out to the public as a justice of the peace; and the consequence will be that any individual may assume that character, and sign papers, which shall have the force of judgments against other persons, simply on the proof of his hand-writing, and that many such papers had been signed by him. When so much importance is attached to the judgment of magistrates as to render them unexaminable in another suit, their existence and authenticity ought to be established beyond controversy; and since the extensive civil jurisdiction of magistrates in this state, has placed their judgments on an anomalous footing, and beyond the strict application of the rules of evidence pertaining to the regular judgments of courts, their legal existence ought to be ascertained by every reasonable enquiry, before they are ultimately enforced.

For these reasons, I think the evidence offered (286) ought to have been received, and that there should be a new trial.

HALL, Judge.—It cannot be seriously contended, that the judge erred in refusing to suffer a plea to be entered, after the jury were impannelled; to do it or not, depended upon his discretion under all the circumstances of the case.

The evidence offered to show that the judgment was confessed without the limits of the county of Granville, I think, ought to have been received. The case of *Bain v. Hunt* (10 N. C., 572), does not stand in the way; that can decide only, and was intended to decide only, the effect of a judgment given by a justice of the peace; but by no means to decide either as to the quantum or species of evidence necessary to prove the existence of such judgment; no such question was before the Court. The only question there submitted was, whether assumpsit would lie on a judgment rendered by a justice. The Court decided that it would not, and quoad that point, and that only, compared it to a record, which precludes all future discussion,

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as to the subject matter of which it is evidence; but the question as to proof of its existence as before observed, was not touched. Such judgment is the judgment of a court not of record, therefore cannot be established as a record, but is to be established as a public writing, not of record, by parol evidence. Parol evidence may be met by parol evidence; of course, when the judgment was proved in this case, parol evidence might be received to show that the judgment, although proved, was confessed without the limits of the county. For these reasons, I think the rule for a new trial should be made absolute.

HENDERSON, Judge.--In saying, in the case of *Bain v. Hunt*, decided twelve months ago, that an action of assumpsit would not lie on a judgment rendered by a single justice of the peace, nothing more was intended to (287) be said, than that such a document contained in itself *an inference of law*, that the sum therein adjudged by the justice to be due from the defendant to the plaintiff, was in law due, and that upon its being proven to be such a judgment, the debt itself was proven, and that in that respect it differed from such documents, writings, and promises, on which an action of assumpsit could be supported, and which of themselves contained only inferences of fact, which must be drawn by a jury if controverted, before the inference of law, that there was a legal obligation could arise. A note not under seal, being only a promise to pay, creates not of itself an obligation to pay, there must be a consideration for the promise to create a legal obligation, this fact must be found by the jury or admitted on the record before the court can draw the inference of law, that the promise creates that legal obligation. It is true that the jury may, from the note, make that inference, as it is evidence that the maker has so much money in his hands belonging to the payee, as lent, or had and received, but still it is matter of fact for the jury to infer, and which inference they are well warranted in making from the nature of man; for it is not to be presumed that a person would give that deliberate evidence of a promise to pay, without having received an adequate consideration. In the case of *Stamps v. Graves*, decided at the last term, I have expressed my opinion as to what operation the statute

of *Anne* has upon such notes, I shall not here repeat it. As an exemplification of the effect of this doctrine, were the jury, in a special verdict, to find that the defendant had at such time and place made his promissory note to the plaintiff, wherein he had promised to pay him one hundred dollars, *and that* he hath not paid the same or any part thereof, and pray the advice of the Court as to the legal effect of the note, the Court would be bound to render judgment for the defendant, because the jury had not found that the note was given on any consideration, but had they have added that the note was given for so (288) much money lent, a horse, goods sold, or any other adequate consideration, judgment would be rendered for the plaintiff; but if instead of a note not under seal, the jury had found that the defendant had made an obligation under seal, and asked the advice of the Court, judgment would have been rendered for the plaintiff, because a writing under seal imposes an obligation without a consideration. As an action of assumpsit will not lie on such sealed instrument, as it of itself imposes a legal obligation, so the Court said, in the case of *Hunt v. Bain*, that as the justice's judgment of itself imposed a like obligation, an action of assumpsit would not lie on it; in the same manner, if a person binds himself by a valid obligation to perform a certain act, as to deliver corn, a horse, or the like, as the specialty itself imposes the duty, an action of assumpsit will not lie on it, but the party must bring an action of covenant. If I am asked the reason why the action of covenant, or an action of debt, is the proper remedy, and not an action of assumpsit, the only answer I can give is, that it has pleased our forefathers to prescribe different forms of action for different injuries. It may be shown, from the plea in the action of assumpsit, that it is not adapted to such an instrument or document as of themselves import an obligation, the general issue is non assumpsit, which denies the liability to pay without denying the instrument or document from whence that liability arises; if that document of itself imposes an obligation, it is putting in issue the legal inference, it is admitting, and at the same time denying, the liability of the defendant. Thus, if to debt on bond or record, *nil debet* is pleaded, it is bad, for by not denying the bond or record the debt is ad-

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mitted, it in fact amounts to a demurrer; but such plea is good to an action of debt on a note without seal, for you may admit the making of the note and yet deny the debt, for the debt arises not from the note alone, it must be made on consideration. The decision of *Hunt v. Bain* only establishes this, that a justice's judgment is evidence of a debt itself, and therefore an action of assumpsit will not lie on it.

But it does not follow, as was contended in the (289) argument of this case, that justices judgment are records, because an action of assumpsit will not lie upon them, or because being established, they are conclusive evidence of a debt, or because they are entirely unlike foreign judgments, or judgments of inferior courts of England; for a bond is unlike all these, and yet it not a record and the expressions used by the Court in delivering the opinion of *Hunt v. Bain*, must be understood in reference to the object in view—they relate to that quality which they possess in common with records of concluding the parties from denying their affirmations, and not as to the mode of proving them. It was never thought that they, like records, carried on their face, such marks of their own verity that they proved themselves, and did not receive trial by jury, witness or otherwise, but by themselves. It is very easy to define what a record is, but it is not so to declare which are courts of record, and which are not. Sir Edward Coke's definition, is more like pointing out which are the courts of record in England, than giving the distinguishing feature of such court. Other definitions are equally unsatisfactory. Were I to attempt one, I fear that it would be still more faulty; but we may with safety say that a justice's court is not a court of record, because the law has not prescribed a mode of authenticating and perpetuating their proceedings, because their procedures have not upon their face those indicia of verity which prove themselves upon a bare *inspeximus*, and that they require the aid of proofs *dehors* themselves; and from their nature and multiplicity, being capable of being made anywhere in the county wherever the justice may be, and being under the private seal and signature of the justice only, it is not to be believed that the legislature intended that they should be received as genuine and authentic

without the aid of proof; but this interferes not with the verity of their affirmations after having been proven. It is said, that it must be a record, because it was said in the case of *Hunt v. Bain* to be entirely unlike the proceedings of the inferior courts of England, and also (290) unlike the judgments of a foreign court, therefore it must be the judgment of a court of record. Does it follow that the legislature cannot create a new class of documents, or that of necessity, because it cannot fall into one class, it must fall into the other, where the two classes embraced only all those which were in existence at the time, and not those afterwards formed? It is admitted, that if a document was formed, it would fall into that class already in existence, with which it possessed common properties; but if it possessed common properties with neither, it would then form a class of itself. Such is this justice's judgment, it is unlike the judgment of a court of record, because it wants the power of proving itself; it is unlike the judgment of the inferior courts in England, and foreign judgments, because it differs from them in this, its affirmation cannot be controverted, and these differences arise from this. As to a foreign court, we know nothing of the justice of their laws; we presume they are just, but we do not know; we will permit the adverse party to destroy that presumption by proof, and more especially as to the matter of fact, and even as to law, if they are shown to be unjust; we will not enforce an unjust judgment of a foreign court, but will lean much in favor of their justice, and call in even the aid of their policy to show them to be just. As to the judgments of the inferior courts of England, they are mostly local, governed by particular laws, frequently held by private individuals, and do not proceed according to the course of the common law, and therefore, their decisions are not reviewed by means of writs of error, the proceedings in which are according to the laws of the land, and they alone form the rule of decision, there is no graduation from them up to the Superior Court. It is true they are superceded occasionally by the King's Bench, by means of certain discretionary writs, which issue as it were on the supplication and not on the application of the party. To make their decisions more than *prima* (291) *facie* evidence, would operate an injury on the suit-

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ors, because they could not have them examined in the regular way, or as a matter of right. As to the courts held by our justices, they are entirely different, they are governed by the general laws of the land, and there is a regular graduation to the court of supreme jurisdiction, by way of appeal which of itself must make their judgments conclusive.

I have taken up much time to explain the case of *Hunt v. Bain*, and to show that this case is unaffected by it, because that case has been much misunderstood, and if not corrected, might lead to consequences never contemplated by the Court. The justice's judgment not proving itself, must therefore be supported by proofs, and therefore may be shown to be different from what, upon the face, it purports to be; it may be shown to be a perfect nullity. The jurisdiction of justices of the peace being confined to the counties for which they are appointed, the Granville justice had no jurisdiction in Franklin, his acts within the latter county, were those of a private individual; by proving, therefore, that the transaction took place in Franklin, before a person who had no jurisdiction to act as a justice of the peace in that county, destroys its apparent official character, and reduces it to a mere statement or certificate of a private individual, and should have been received. The other objection, that the justice should not be heard to impeach it, cannot prevail. The rule is, that a party shall not allege his own turpitude or departure from correctness as a protection; but there is no such rule in our law, infamy and interest are the only grounds of excluding a witness who has sufficient understanding to know and feel the obligations of an oath.

There must be a new trial.

Judgment reversed.

Approved. *Carroll v. McGee*, 25 N. C., 13; *Cobb v. Kornegay*, 28 N. C., 358; *S. v. Mangum*, *Ib.*, 369; *Reeves v. Davis*, 80 N. C., 209.

PASCHALL v. WILLIAMS.

(292)

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From Warren.

The charge of a Judge should be judged of by its general scope and spirit; hypercritical niceties are to be disregarded. When, therefore, in an action for an assault, the jury was told to imagine themselves placed in a situation similar to that of the plaintiff, and to give to the plaintiff such sum as they would be willing to take as a compensation for the injury; the language is not to be understood *literally*. It is to be considered as admonitory to the jury to regard not merely the wrong sustained by the plaintiff, but the provocation he had given, the effect produced on him, the ability of defendant to make compensation, and to estimate the damages from a view of all the circumstances.

Trespass for an assault and battery, tried below, before PAXTON, Judge. Upon the trial, the only question was as to the amount of damages, it being admitted that plaintiff was entitled to recover. Upon this question the counsel addressed the jury; and the judge, in his charge, informed the jury that the amount of damages was for their consideration entirely, and in making up their opinion on the subject, it would be right for them to take into view all the circumstances of the case, and allow the plaintiff such damages as would compensate him for the injury he had sustained.

The jury was told to imagine themselves placed in a similar situation with the plaintiff, what sum would they think sufficient to compensate them for such an injury; that in viewing the subject in this light, by giving to the plaintiff what they would be willing to take, the justice of the case might be reached.

The jury found a verdict for the plaintiff, damages \$1,000 and costs, a new trial was moved for and refused, and defendant appealed.

Gaston, for appellant.

Badger, for appellee.

TAYLOR, C. J. — A very minute scrutiny of this (293) charge might possibly detect something in it, which we do not feel to be quite right, while we should be utterly at a loss to prove it to be wrong, from the absence of any standard whereby to measure judicial advice, upon subjects not provided for by law.

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Its literal meaning would perhaps convey an impression of what was impracticable in itself, what the Judge did not intend, and what the audience did not understand. Collectively, the jury could not place themselves in the plaintiff's situation, unless their temper, fortune, feelings, and standing in society, resemble his; and the attempt to do it, individually, would be an insuperable bar to an unanimous verdict. Such a rule of construction cannot be applied to these compositions with any useful or practical effect. They should be judged of according to their general scope and spirit, and if the whole mass is calculated to reflect a just light upon the path of the jury, the little shadow from the angles and corners may be well overlooked. Criticism should pronounce upon them in the liberal spirit of her philosophy, and not with the austerity of her logic. I think it probable, that the jury understood it as admonitory to them to regard not merely the wrong sustained by the plaintiff, but the provocation he had given, the effect produced on him, and the ability of the defendant to make compensation, and to estimate the damages from a view of all the circumstances. It should certainly be understood as the jury probably did understand it, under the recent impression of the evidence and arguments, and I cannot think its tendency was to lead them from the proper enquiry. In this belief, I think the verdict ought to remain.

And of this opinion were the other judges.

Judgment affirmed.

Approved. S. v. Langford, 44 N. C., 436.

 PERSON v. THE PRESIDENT AND DIRECTORS OF THE STATE
BANK OF NORTH CAROLINA.

(294)

From Wake.

Where a plaintiff sued out twenty-one warrants on twenty-one notes, amounting in all to one hundred and four dollars, in cases where the causes of action were the same, and the defence was the same in all, the Court compelled plaintiff to consolidate.

Person warranted the State Bank in twenty-one different cases, on their notes, the whole amount of notes being somewhat more than \$100, and having obtained judg-

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ments, the bank appealed to the County Court of Wake. In the County Court, defendant moved to consolidate the several suits, and the Court ordered them to be consolidated, on condition that the defendant would not plead in abatement, the want of jurisdiction in the justice who tried the warrants, and that they would pay the fees of the clerk and constable. Defendant acceded to the terms, and pleaded the general issue, payment and set off, and the cause was put to a jury, who found a verdict for the plaintiff, and assessed his damages to \$127 34 and costs, according to which finding the Court gave judgment, from which defendant appealed to the Superior Court. The plaintiff also appealed from the judgment of the Court as to the consolidation. Afterwards, in the Superior Court, PAXTON, Judge presiding, it was ordered that the appeal of the plaintiff from the order of consolidation should be dismissed with costs, and the cause stand as one suit. Brought upon appeal by the defendant; whereupon, *Person* appealed to this Court.

In this Court, by consent of parties, the records of all the cases in the Superior Court (twenty one in number) were considered as being before the Court, from which it appeared, that in each case, the justice gave judgment for fifty cents more than the note amounted to, besides interest; and further, that ten of the notes were protested, and eleven were not.

Haywood, for the Bank.—This appeal should be (295) dismissed, for the order of consolidation was no final judgment. If it be such a final judgment that upon it an appeal may be had to this Court, it is also such as that an appeal might have been taken thereon before verdict to the Superior Court, and in either case the appeal of the plaintiff must be dismissed, as he did not appeal from the order in the County Court before verdict.

A rule to consolidate is matter of discretion in the Court, and it has been repeatedly decided that there can be no appeal from the discretion of one Court to another.

But the County Court acted rightly in ordering these suits to be consolidated. This manner of proceeding is admitted to be law, and the right of the plaintiff respecting *Bank bills* must be alike, so where a bank holds several notes of an individual, and if here the defendant had held

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the plaintiff's notes of the same tenor and due at same time, and had brought twenty-one suits against him, the whole community would have been roused, and this Court would have little hesitation in attaching to such proceedings the character of *shameful oppression*. Shall the mere change of sides between the same parties, require of us to introduce the fable of the Lawyer and Farmer?

From the cases of *Cecil v. Briggs*, 2 *T. Reports*, 639; 9 *Johnson's Reports*, 262, and *Tidds Practice*, 556, it is clearly deducible as a rule on this subject, that wherever there are two or more suits between the same plaintiff and same defendant, for notes or other contracts, which may be joined in the same declaration, the Court will give to defendant a rule to consolidate, and *clearly* so where the notes sued on, fall *due at the same time*, and suits are brought thereon at the same time.

Now here, the bank bills were not due till demanded, and being all demanded at the same time, then became due to *Jesse Person*. Indeed it may well be urged, that these bills are but written evidence on separate papers of one debt, due by one contract.

If the plaintiff can bring his separate warrants on (296) each bill, and the defendant be without the right to this rule, what difference is there in the cases which is to prevent a merchant from suing out a warrant for each *item* in his account? And who would be willing to sanction such a practice?

It is said, however, that the case before the Court is not like that of *Cecil v. Briggs*, because in the latter case defendant was held to *bail*. The Court, in giving their opinion in the case, do not rely on that fact at all, they only enquire whether the proceedings taken are *oppressive*? And if it be not oppressive, to heap costs on a defendant to the full amount of his debt or more, I can scarcely conceive that Courts would regard it so to ask *bail* of the defendant.

It is also argued, that no consolidation must be made where warrants are sued out, because by increasing the sum adjudged in each separate warrant, the defendant will obtain the benefit of enlarging the stay of execution. If this proves any thing, it is in favor of the defendant. Our legislature have clearly intended, that where a man owed

\$100, as it might injure him seriously to have his property sacrificed the next day after judgment, at the suit of a grinding and oppressive creditor, therefore he might have the privilege of six months time to raise the money, and for less sums shorter periods are allowed. Will this Court permit a practice to grow up that shall control this provision of our law, which has proved so kind a shield to the poorer class of an industrious community? It is manifest that the length of stay is intended to be regulated by the amount of the *debt*, but a lender of money, or other creditor, need only take twenty notes of his debtor for five dollars each, and instead of six months stay, the defendant gets only twenty days.

The case of *Smith v. Bowell*, 4 N. C., Rep., 200, is referred to as conclusive authority against this rule of consolidation; but by a reference to that case, the Court will see that it proceeded entirely on the ground that our (297) Legislature having passed a law to prevent the issuing of *due bills*, imposed as a penalty on the maker, that he might be sued on such due bills without regard to the amount, in the County or Superior Court, and that no demand was necessary, and a rule of consolidation given to the defendant would disarm the act of its sting, and virtually repeal its provisions. It is therefore no authority in this case.

But suppose this Court shall be of the opinion that the consolidation rule was improperly granted, and that it is the right of the plaintiff to have his separate action. In the County Court this rule is given on payment of clerk's and sheriff's costs, the defendant accepts the terms, pays the costs, and the plaintiff then joins issue on the *one consolidated suit*, and takes his verdict. It is too late for him to complain.

HALL, Judge. —The power which the Courts exercise in consolidating actions, has for its object the attainment of justice with the least expense and vexation to the parties, but in the exercise of this power the decisions have not been uniform.

In *Smith v. Crabb*, 2 Str., 1149, and *Mynot v. Bridger*, *Ibid.*, 1178, the Court refused to consolidate, because being distinct actions, the plaintiff might be ready for trial in one

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action, but unprepared in the other. But in *Cecil v. Briggs*, 2 Term, 639, the Court held that not to be a good reason against consolidating two actions, both being brought in assumpsit, the causes of action arising in the same county, the writs having been sued out on the same day, and the defendant having been held to bail in both actions; because they said, if the defendant was not ready in both actions, but only ready in one, he might continue both. The reasoning on which this case stands is not satisfactory to the Court, in *Thompson v. Sheppard*, 9 Johnson, 262—there three actions were brought by the endorser against the maker on three promissory notes, the notes were dated on different days, for different sums, (298) and payable at different times to the same person, who endorsed them to the plaintiff, the writs were issued at the same time and served at the same time. On motion for that purpose, the Court refused to consolidate the actions, because they said different defences might be set up.

In the present case the different suits commenced by way of warrant. The defendant appealed to this Court; if they appealed without just cause, they ought not to be favored. The justice gave judgment in each case for fifty cents more (besides interest) than the notes amounted to, amounting in all to \$10 50, ten of the notes were protested, eleven were not protested. In this situation of things, the defendant might have supposed themselves aggrieved. I therefore lay that circumstance, the appeal, out of the way. Where suits were commenced by way of warrant, two warrants would have answered the plaintiff's purpose to recover \$104, as well as twenty-one, and indeed would have been less trouble to him as well as expense to the defendants. When the warrants were consolidated in the County Court, I can see no injury the plaintiff was likely to sustain by it; it was altogether improbable there should be different defences, the causes of action were the same. I cannot therefore find fault with the discretion which the Court have exercised, much expense or costs is saved by it. Although the authorities before recited differ in some respects, they all agree in this, that the Court possesses the power of consolidating suits when a proper occasion offers.

I think the judgment of the Superior Court should be affirmed.

The CHIEF-JUSTICE and Judge HENDERSON, concurring,
Judgment affirmed.

RAWLS, infants, by their Guardian, v. DEANS and others.

(299)

From Hertford.

A record cannot be *prima facie* evidence; where admissible at all the fact which it affirms cannot be contradicted; where it affirms a fact *inter partes*, such affirmation is conclusive upon parties and privies; where it affirms a fact in a case where no one was a party, it is evidence of that fact as to all persons alike.

Where a suit was brought against three Justices of the Peace by an infant, for having appointed a guardian for him without taking any bond, the record of the County Court was offered in evidence by Plaintiff, showing that on a certain day of a certain term the Court was opened, the defendants being on the bench as Justices at the opening of the Court, and various orders were entered on the record, among the rest, the appointment of the guardian to plaintiff; this record was offered as evidence that the defendants were the justices who made the appointment; Held, that it is not *prima facie* evidence of the fact; because a record, if evidence at all, is conclusive, it was evidence from which no inference of law is drawn, but it should have been left to the jury to draw from it the inference of fact that the defendants did make the appointment, if it would furnish them with any such inference.

This was an action on the *case* brought against the defendants to recover damages for a violation of their duty as magistrates.

The plaintiffs were orphans and infants, and alleged that the defendants, acting as a Court at November Term, 1819, of Hertford County Court, appointed one *George Gordon* to take care of, and attend to the management of the estate of the plaintiffs, without taking from *Gordon* bond and security as required by law; that *Gordon*, by virtue of such appointment, took into his hands the whole of the estate of the plaintiffs, and converted a large portion of it to his own use, and since that time has died insolvent.

To support the allegation that the defendants were on the bench, and constituted the Court which appointed *Gordon*, the plaintiffs offered in evidence the records of

Hertford County Court; from which it appeared, (300) that on Thursday morning of the term, the Court

met pursuant to adjournment, and the defendants were stated to be present as justices at the opening of the Court, and among other orders of that day, the third entered on the record was the order that Gerdon should rent out the lands of the plaintiffs, and take bond with security to their use, payable to the chairman of the Court, and file them with the chairman, and attend to the management of the estate of the plaintiffs, until a guardian was appointed.

The introduction of this record was opposed by defendants, on the ground that the order as entered, did not recite the names of the defendants as the justices who made it. The Court, NASH, Judge, presiding, overruled the objection, and instructed the jury that the record was *prima facie* evidence that the defendants were the justices who made the order.

There was a verdict for the plaintiffs; a new trial was refused and judgment rendered, when defendants appealed.

Hogg, for appellants, contended, that the act of 1762, which gave to these plaintiffs their action, left the evidence at common law; it does not direct that the justices shall cause the clerk to enter of record the names of those present, and that such entry shall be evidence either *prima facie* or conclusive that the appointment was made by certain justices. The proof therefore, remains *in pais*, and the party suing must prove, as all other facts are proved, that defendants were the justices who made the order. The entry which is made on the record is conclusive evidence to all the world, of the *fact* of appointment, and of the *right* of the guardianship as to all parties and privies; but as no law declares that the names of the justices appointing shall be recorded, when the enquiry is who they were, it must be proved by testimony inferior to the record, but higher than the minutes of the clerk of the Court, which, whether entered in the same book with the judicial proceedings of the Court, or in a separate book, are not evidence of any thing.

Our County Courts are of record; by the act of (301) 1777, *any three* of the justices may hold them, and whatever they do in pursuance of the powers conferred by the Legislature, and nothing else, shall be of re-

cord. In two instances, *chap. 327* and *chap. 777, New Rev.*, statutory evidence of record is provided for in cases exactly analagous to that of the appointment of a guardian; it would seem therefore, conclusively, that no entry by the clerk of such fact can make it a record without a special enactment.

But 2dly, if the entry be evidence that certain justices *did appoint*; in case of a penalty so grievous and heavy as this, it should be made appear that he did enter specially and distinctly the fact that they did appoint, it should not be left as a matter of uncertain inference. By the copy of the minutes, it appears that the defendants were present as justices at the opening of Court, on Thursday, of the November term of 1819; that in the course of the day, six or seven entries were made on the clerk's minutes, and among others, the order complained of; but at what time during the day, does not appear, nor can it be conjectured; no particular hour of that day can be assumed as *probably* the one in which this order was made, and much less is there *certainty*; but the record ought to be certain to a *common intent* at least. The plaintiff says, it must be understood that the same justices who opened the Court, continued to preside all day; and the judge charges that to get clear of this understanding, they must prove that they *did not* sit when this order was made, as *prima facie* it appears that they did; and this presumption is said to arise in a case where any three justices out of thirty or forty may hold the Court, and where the magistrates are continually changing. It is absurd to suppose that the same persons who opened the Court are answerable for all the judicial acts of a Court, where they are not obliged to be present all day, and where they have no power to prevent fifty other magistrates, each of equal authority with any (302) one of them, from taking part in the proceedings of the court. Suppose, on the day on which this order was made, a sheriff had been appointed, and had gone on to discharge the duties without giving bond, and the clerk had failed to record the names of the justices present when the election was made; would it be held that the three justices who are stated to have been present at the opening of the court, appointed the sheriff, notwithstanding the law

requires the appointment to be made by a majority of the justices of the county?

3dly. The act of the Court was culpable, but is not within the law, they did not appoint *George Gordon* guardian, but to do a particular act which they could not authorize him to do; he was a trespasser in doing it, and not a guardian; and if he was a guardian, the liability of the justices arises from taking insufficient security, not from failing to take security altogether.

Gaston, contra, argued that this was a record, and that a record is always evidence, and in civil cases, the highest evidence of whatever it declares, for whomsoever, and against whomsoever it is offered, and he cited as instances the probate of a will, granting letters of administration, a sentence in an ecclesiastical court declaring a marriage, the conviction of a felon offered as a witness, condemnation in courts of admiralty and exchequer; that these records "import in them such uncontrollable credit and verity, as to admit no averment, plea, or proof to the contrary." (*Co. Lit.* 160, *a. Gib. Ev.* 5; 1 *Phil.*, 218.) And that they are always admissible to establish the fact which such record declares, when the existence of that fact is in controversy.

The act of the legislature requires that three magistrates should be present holding the County Court, the record properly states who they were.

As between parties and privies, the record is evidence to establish the correctness of what was adjudged, it is conclusive of the *right in contest*. (1 *Phil.*, 222.)

(303) But to establish the *fact* that the Court did so act as therein stated, they are universally evidence. (4 *Burr.*, 2271; 4 *Term. R.*, 590; 2 *East*, 459; 1 *Phil.*, 219.)

And even when the record states what is not material, though not conclusive, it is *prima facie* evidence of it. (*Phil.*, 219; *Com. Dig.* "*Estoppel*" *E.*, 6; 3 *Inst.*, 230; *Gib. Ev.*, 230; 5 *Term.*, 436-445.)

And to show that an action would lie against a ministerial officer for any individual injured by his breach of duty, he cited 6 *Term.*, 646-649; 3 *Bl. Com.*, 123; 1 *Salk.*, 18; 9 *Johns. R.*, 335.

The Judges severally delivered their opinions as follows:

TAYLOR, C. J. — Neither a just construction of the acts of Assembly on this subject, the well known course of business, nor the reason of the thing, warrants, in my apprehension, the reception of this record for any other purpose, than to show that the Court was opened by the three justices named, and that the various orders were made by a *Court* legally constituted. In receiving it as conclusive for these purposes, the rule of law is satisfied, and the interests of justice are maintained; in receiving it as *prima facie* evidence, even that particular persons were on the bench at the precise moment when the order in question was made, may, in most cases, burthen innocent persons with a heavy charge; for this *prima facie* evidence becomes conclusive, unless it is answered and repelled by the defendants. The difficulty of proving when they were in the crowded and confused state of a court-yard, when the order was made, would generally be insuperable; and it is unjust, that persons who are rendering disinterested services to their country, should pay large sums of money for others, or escape from the penalty, *only*, by proving an *alibi*.

The act of 1762, c. 69, seems to have intended that the individual justices should be ascertained by some proof more specific; for when it confers the power of appointment, it speaks of the *Court*; where it imposes a (301) penalty for the improper exercise of the power, it refers to the *individuals* composing it at the precise point of time; thus endeavoring to guard against the very evil which the introduction of this record as evidence would produce. It is not the Court, but the *Justice or Justices appointing* such guardian, who shall be liable for all loss and damage. We must believe, that the Court made all these orders, because the record says so; but we cannot believe that the defendants were the individuals composing it, unless there were none others competent to form a Court. It is impossible to shut our eyes to the fact, that though the Court may be in session throughout the day, the individuals composing it are continually changing, and of these changes, no memorial is made by the clerk. Some times three justices are collected for the purpose of opening the Court, which when they have done, they yield their places to others, whose stay there may also be brief,

and the physical identity of the Court changes with every passing hour.

——— *ut unda impellitur unda,
Tempora sic fugiunt pariter, pariterque sequuntur.*

An act passed in 1790, c. 327, relative to the appointment of several public officers, serves to show the light in which the individual responsibility is regarded by the legislature, and the spirit in which these laws are conceived. The clerk is directed to make an entry at large, under a heavy penalty, of the names of the justices who shall be in court, or on the bench, at the time of the qualification of those officers; which would have been an useless provision if the record of the opening of the Court had been evidence of the fact; and when that law was passed, a majority of the justices, or a certain number beyond three, was not necessary to the appointment of those officers.

My opinion is, that the record was improperly received for any other purpose connected with the case than to show that these justices were present on that day, when the Court was opened, and that their averment that (305) they were not present when the guardian was appointed, is not in conflict with the record, which is not therefore an estoppel. I am in favor of granting a new trial.

HALL, Judge.—The act of 1762, *New Rev. ch. 69, s. 5*, declares, that if any court shall commit an orphan's estate to the charge of any person without taking sufficient security, the justices appointing such guardian, shall be liable for loss and damages, &c., to be recovered by action at the common law. The act does not point out any mode by which the fact shall be established. I believe it is not usual with clerks, when entering such orders of appointment, to recite the names of the justices by whom they are ordered to be made, as is directed to be done by the act of 1790, ch. 327, when sheriffs and other officers are elected. It would certainly be the most eligible way of ascertaining the fact. But when that is omitted to be done, the parties are at liberty to prove the same fact by parol evidence, because, I think such proof by no means contradicts the record.

I have no doubt but it was proper to read the record on the trial, the introduction of which as evidence, is complained of. It proves that a Court was opened, and held, &c., but what further effect it ought to have, or what further fact it should be taken to establish, is a question of great importance.

The law establishing County Courts declares, that the same may be held by three justices. In most of the counties, there are from twenty to fifty justices, and it is as much the duty of one as another, but not more so, to hold the courts: hence, it is not to be expected that the courts will be held by any particular justices. Sometimes one portion of them are on the bench at one time, and others at another, and this on the same day, and no doubt it was for this reason, that the legislature directed the clerks to record the names of the justices on the bench when particular officers were elected, as before noticed. This

(306) being the practice of the justices in holding the County Courts. I think the record in question, should not be taken as evidence of the fact, that the defendants were the justices who appointed *Gordon* guardian, &c. The fact may have been so, but it may have been otherwise; and in fixing a charge upon individuals so penal as this, more certainty ought to be required, when the case will admit of it; otherwise innocent persons may suffer.

It is a hardship on infants, that their interests should be neglected, and their property lost, by acts of omission by justices; and it is for that reason that the legislature have made them personally responsible; and no doubt the will of the legislature will be obeyed when evidence is sufficient to point out the proper persons, and is made to bear upon them. As I think that has not been done in the present case, independent of the record, and as I think the record is not sufficient for that purpose, I am of opinion that the rule for a new trial should be made absolute.

HENDERSON, Judge.—A record cannot be *prima facie* evidence, by which I understand that evidence, which until contradicted, proves the fact, but which may yet be contradicted. Wherever a record is admissible, the fact which it affirms cannot be contradicted. Where it affirms a fact *inter partes*, and which of course they had the right

to controvert, and which they did controvert or admit, then its affirmations are conclusive upon the parties and their privies. Where it affirms a fact where no one was a party, and of course no one had the right to controvert it, and no one of course did controvert it, then it is evidence of that fact, as well as to one person as another; that there are no parties or privies; it is not made upon the litigation or admissions of any one; and proceedings *in rem* are evidence against the whole world for the opposite reason, for being parties, they either have or might have controverted. The record offered in this case, is of

(307) that kind where no person was a party; it was not made upon the litigation or admission of any person; its affirmations are therefore conclusive upon all, upon one as well as another. It is therefore necessary to ascertain what are its affirmations. It affirms that on the — Monday in November, a Court of Pleas and Quarter Sessions was held at Winton, for the county of Hertford, and was opened by justices who are stated to have opened the Court; it is also evidence that the various suits were tried or continued, and all the orders made, which appear upon the rolls or records of the Court, and that the Court adjourned from day to day; and that on Thursday the Court met pursuant to adjournment, and at the meeting of the Court the defendants were present, presiding as justices in the Court; that the Court on that day tried and continued the different suits mentioned in the proceedings, and made the different orders appearing upon the minutes, and among others the order committing the estate of the plaintiffs to the management of *Gordon*; all these facts stand upon the rolls, and no one can controvert them; that is, that these things were done. But what is to be inferred from these facts, is a very different thing from making the record *prima facie* evidence; and from determining, if an inference is to be drawn, whether the law will draw it, or whether it is to be left to the jury to draw. If it is *prima facie* evidence, then the fact stands proven, that the defendants were on the bench when the order complained of was made. Until they show the contrary, it throws the burthen of proof upon the defendants; whereas if it is only an inference of fact, it is left to the jury to say, whether it is proven to their satisfaction, that because the defendants

were present when the Court opened (which fact cannot be controverted by any one as long as it stands upon the record) that they were also present when the order was made. A thing very different from making it *prima facie* evidence. If this is matter of inference, all the doctrine of probabilities are to be gone into by the jury, and (308) they will determine according to the evidence of the common practice, whether it is probable that they all were there, and if not all, who were; for in civil causes, we are obliged to go upon probabilities to settle the right of the parties, and I am disposed to think, that it is a presumption of fact, not of law; for it is not generally true, that the ends of justice would be more often answered by drawing the conclusion as one of law, that they were there, than by leaving each case to be decided by the jury; for if made a presumption of law, the defendants would not be permitted to prove that they were not there. I think, therefore, the judge erred in telling the jury that the record was *prima facie* evidence of the fact that the defendants were on the bench when the order was made, and thereby threw on the defendants the necessity of offering opposing evidence; but, in the absence of all other evidence as to the point, he should have informed the jury that the record only affirmed that the defendants were present when the court was opened; that whether they would infer therefrom that they were also present when the order was made, was a fact on which they would decide, that the law did not draw the inference one way or the other, and which indeed would be more emphatically expressed, by the phrase, leaving it to them. The effect of the clerk's having stated on the record that they were present, if he had made such entry, not being required by law to do so, it is unnecessary to examine, for in fact he has not made such statement.

Let a new trial be granted.

Judgment reversed.

BRASFIELD v. WHITAKER.

(309)

BRASFIELD v. WHITAKER.

From Wake.

The lien created by an execution is continued by an *alias* regularly issuing thereon; and if execution, at the instance of another plaintiff, issue after the lien of the first commenced, and before execution is fully done under it, the *alias* come to the sheriff's hands, it shall have the preference.

This was a case agreed as follows: the plaintiff, *David Brasfield*, at the November sessions, 1820, of Wake County Court, obtained a judgment against one *Mark Cooke*, for \$390 34, with interest, &c., and costs. Upon this judgment, the plaintiff sued out a writ of *fi. fa.* returnable to February term of Wake County Court, 1821, directed to the sheriff of Wake, which in due time came to the hands of the defendant, then sheriff of the said county, and which was returned by him endorsed, "nothing to be found."

Plaintiff then sued out an *alias fi. fa.* returnable to the May Sessions of the same year, which came to the defendant's hands on the 6th of March, 1821, and was returned, "nothing to be found."

At February Sessions, 1821, of Wake County Court, *Hutchins G. Burton* recovered a judgment against *Mark Cooke* for \$2512 99, on which a *fi. fa.* issued, returnable to May Sessions, 1821, which came to the defendant's hands on the 1st of March, 1821. On the same day, the defendant levied on a lot and improvements in Raleigh, belonging to *Mark Cooke*, and afterwards, on the 27th of April, in the same year, sold the same as sheriff, for \$1,100, and applied the purchase money to *Burton's* execution.

The case as above stated, was submitted to PAXTON, Judge, who gave judgment for the plaintiff for the whole amount of his debt, interest and costs. Whereupon defendant appealed.

Badger & Hawks, for appellant. .

Haywood, for appellee.

HALL, judge, delivered the opinion of the court:
(310) *Brasfield's* execution was a lien on *Cooke's* property, and that lien was continued by the *alias* execution which issued regularly after it.

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Burton's execution issued after this lien commenced, and execution was not done fully under it, before *Brasfield's* alias execution came to the hands of the sheriff.

Brasfield's execution had the preference, and should have been first satisfied.

Judgment affirmed.

Doe on dem. GILLIAM v. JACOCKS.

From Bertie.

These words are found in a deed of *bargain and sale*, viz: "Furthermore, I, the said M. H., for myself, my heirs, executors and administrators, do covenant and engage, the above demised premises, to him, the said J. H., his heirs and assigns. against the lawful claims or demands of any person or persons whatsoever, forever hereafter to warrant, secure and defend." *It seems* that this is a *personal* covenant, and not a warranty.

M. H., the grantor in the deed, was tenant in tail, and supposing the clause above cited to be a warranty, still no discontinuance of the estate tail is worked by reason of such warranty occurring in a deed of bargain and sale; nor is the heir in tail put to her *formedon*. *Quere*: Can the writ of *formedon* be now brought?

The first heir in tail after the death of M. H., the grantor in the foregoing deed, when the right devolved on him was an infant, and died before the disability was removed, leaving an infant heir, who became covert before full age, and brought her action within three years after discovery; she is not barred by the statute of limitations—she comes within the saving of the act.

Specal verdict as follows:—The jury find, that the lands demised to the plaintiff were granted to *John Hardy* in the year 1717, and were by his will in writing, duly executed to pass lands, dated 1719, devised to his daughter *Elizabeth Hardy*, in the words following, "Also I give unto my daughter *Elizabeth* another tract of land, lying on the east side of Rogues Pocoson, containing four hundred (311) and twenty-four acres, excepting the one hundred acres given to my brother *Thomas*." And after giving other lands, he devises as follows, "All which said lands I give unto my said daughter *Elizabeth* and her heirs lawfully begotten of her body." The jury further find, that after the death of *John Hardy*, the said *Elizabeth Hardy* intermarried with one *Nathaniel Hill*, and that there was only one child of that marriage, who was born October 20, 1726, and was called *Michael*. The jury find that *Michael*

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Hill, by his deed bearing date 5th of May, 1748, and duly proved and registered, conveyed to *John Hill* the premises, in the words and figures following, that is to say:—

North Carolina.—To all people to whom these presents shall come, greeting: Know ye that I, *Michael Hill*, of Bertie county, in the province aforesaid, for and in consideration of sixty pounds, current money of Virginia, to me in hand paid by *John Hill*, of the province and county aforesaid, the receipt whereof I do hereby acknowledge, and myself therewith fully satisfied and contented, thereof and of every part and parcel thereof do exonerate, acquit, and discharge the said *John Hill*, his heirs, executors and administrators forever, by these presents, have given, granted, bargained, aliened, conveyed and confirmed, and by these presents, do freely, fully and absolutely give, grant, bargain, sell, alien, convey and confirm unto him, the said *John Hill*, his heirs and assigns forever, one messuage or tract of land, situate, lying and being in the province and county aforesaid, containing, by estimation, four hundred and twenty-four acres, lying on the east side of Roques Pocason, and beginning at a poplar on the side of the Pocason, then north 60, east 320 poles to a pine, then south 74, east 216 poles to a pine in *John Hardy's* line of Brewer's Quarter, then along his line one hundred poles to a red oak, his corner tree, then south 50, west one hundred and sixty poles to Roques Pocason, then the said course 60 poles to a chestnut, then through the Pocason, north sixty-six degrees west to the first station: to have and to hold the said granted and bargained premises, with all appurtenances thereto belonging or in any way appertaining, to him, the said *John Hill*, his heirs and assigns, to his and their only proper use, benefit and behoof forever. And I, the said *Michael Hill*, for me, my heirs, executors and administrators, do covenant, promise and grant to and with the said *John Hill*, his heirs and assigns, that before the ensealing hereof, I am the true and sole owner of the above bargained premises, and am lawfully seised and possessed thereof in my own proper right, and of a good, perfect and absolute estate of inheritance in fee simple: (312) and have in myself a good right, full power and lawful authority to grant, bargain, sell, convey and confirm the said bargained premises, in manner as above said, and that the said *John*, his heirs and assigns, shall and may, from time to time, and at all times hereafter, by force and virtue of these presents, lawfully, peaceably and quietly, have, hold, use, occupy, possess and enjoy the said demised and bargained premises with the appurtenances, free, and clear and freely, and clearly acquitted, exonerated and discharged of, and from all manner of former and other gifts, grants, bargains, sales, leases and mortgages, wills, entails, jointures, dowries, judgments, executions, incumbrances and extents. Furthermore, I, the said *Michael Hill*, for myself, my heirs, executors and administrators, do covenant and engage the above demised premises to him, the said *John Hill*, his heirs and assigns, against the lawful claims or demands of any person or persons whatsoever, forever hereafter to warrant, secure and defend. In witness whereof, I have set my hand and seal, the 5th day of May, A. D. 1748.

(Signed,)

MICHAEL HILL, [*Seal*.]

The jury further find, that *John Hill*, the grantee in the above deed, entered into and was peaceably possessed by actual occupancy, of the premises therein bargained and sold, immediately on the execution of the deed, and con-

tinued so possessed until he departed this life about the year 1770. *John Hill* died intestate, and left *Henry Hill*, his son and heir at law, who upon the death of his father, entered into the possession of the premises which descended to him, and continued his possession by actual occupancy, until the 3rd day of May, 1791, when he by deed of bargain and sale of that date, duly proved and registered, in consideration of £679 10s. to him in hand paid by *Moses Gilliam*, conveyed the premises to said *Moses* and his heirs, by the description set forth in the above deed of *Michael Hill*, and the said *Moses*, in and by virtue of said deed, and by virtue of the statute transferring the possession to the use, was seized of the premises in fee, and entered into possession and continued in actual occupancy thereof until — of May, A. D., 1819, when he was turned out of possession by a writ of *habere facias possessionem*, to the sheriff of Bertie directed, which issued in a suit in ejectment, wherein there was judgment in the Supreme Court of North-Carolina, that one *Joe Doe* should recover (313) damages for a trespass of the said *Moses*, in ousting the said *John* from a term of years, which he held on the demise of *Elizabeth Jacocks*, from the first day of January, A. D., 1813, to the full end and term of seven years, thence next ensuing. And the jury further find, that the said *Elizabeth*, by the sheriff aforesaid, was placed in the possession of said premises, and continued in the quiet and peaceable occupancy thereof, until the first day of January, 1820, when she departed therefrom, and *John Doe*, in and by the demises set forth in the declaration in ejectment, in this suit entered, and was possessed of his term as therein set forth, until the 10th day of January, A. D., 1822, when the said *Elizabeth* entered in and upon the said *John*, and ejected him from his term aforesaid. The jury further find, that *Michael Hill* and *Elizabeth Hill*, had one son, *Hardy*, who was born 21st February, 1756, and died 5th of September, 1777, intestate, aged twenty-one years six months and fourteen days, leaving his daughter *Elizabeth* his only child and heir at law. The jury find that she was born February 18, 1776, and was married to *Jonathan Jacocks* March 17, 1791. The jury find, that she came of lawful age on the 18th February, 1797, and that *Jonathan Jacocks* departed this life the 2d day of Decem-

ber, in the year 1810, and that she brought her action of ejectment in Bertie Superior Court, on the —— day of April, 1818, against *Moses Gilliam*, on which there was a judgment in her favor, and an appeal to the Supreme Court, in which the judgment was affirmed at May term, 1819, and she was placed in possession as before mentioned.

NASH, Judge, who presided, on this special verdict, considered that the law was for the defendant, and gave judgment accordingly, from which plaintiff appealed.

It was in this court admitted, that *Michael Hill* died 1760, and it was agreed the fact should be part of the case.

Hogg, for plaintiff.—The deed of *Michael Hill* to *John Hill*, of 1746, created a discontinuance of the estate (314) tail of which *Michael* was seized, so that the issue of *Michael* could not revest the estate by entry, but must recover the freehold by writ of *formedon*.

A discontinuance may be effected by any deed from a person having "the right of possession," which hath validity to transfer that right; but not the right of property. It is the alienation of the "right of possession," leaving the right of property in another, which must be asserted by an action, and not by entry. A deed of feoffment from a person having the right of possession (a tenant in tail for instance) divests his own estate in possession, and transfers a fee-simple to his feoffee, determinable by the formedon of his issue, whose right of action is saved by the *stat. de donis*. This discontinuance is produced by feoffment, partly because of the notoriety of the transfer of possession from the feoffer to the feoffee, which was completed by solemn livery of seisin, and which the policy of the ancient law would not permit to be annulled by entry in *pais*, and partly because, in the simplicity of the common law, a warranty was implied in every feoffment which rebutted the right of the heir of the feoffer; and the benefit of rebutter could not be had upon an entry, but only by a plea insisting on the warranty as a bar of the real action.

It is not pretended by us, that the deed of *Michael Hill* is a feoffment, or has the effect of a feoffment. It is a deed of bargain and sale, operating under the statute of uses, by passing the use *only* of the lands to the bargainee, to which the possession and seisin of the bargainor are transferred

by the operation of the statute: The deed *itself* operating without "livery of seisin," passes only what the feoffer may lawfully pass, to-wit, his own life-estate. The residue of the estate will descend to the issue of the bargainor, and upon his decease, they may enter on his bargainee, or his heirs, whose estate terminated with the life of the bargainor. But as it is lawful for the tenant in tail to convey the whole of the inheritance of which he is seised (315) provided he leaves lands of equal value to descend to the heirs of his body in fee, in lieu of the estate tail; he may, by any conveyance, *bar* the right of his issue in tail, by leaving them real assets, and by binding them *in a real covenant to warrant* the estate made by him to an alienee and his heirs: whereby the alienee and his heirs will have a fee-simple estate, determinable on the extinction of the issue in tail, when an entry or action will accrue to him in the reversion. By force of a warranty therefore, and real assets descended, the right of the issue in tail, may be effectually barred, notwithstanding the statute *de donis*.

Upon this ground it is, that the warranty itself, without assets, creates a discontinuance of an estate tail—because the law intends, that no man will bind his heirs to warranty without assets, but especially because, if the entry of the issue in tail was permitted, the alienee and his heirs could not have the benefit of their warranty without being put to their writ of *Warrantie Chartæ* (if that lay upon any disturbance besides that of a stranger), whereas if the formedon be brought, the warranty with assets might be plead in bar of the *right* of the issue in tail.

As the discontinuance is imputed by us to the operation of the warranty *solely* in the present deed, it will be well to enquire into the use of that covenant. It was originally an incident of the feudal relation of lord and tenant. Upon every gift of a fee, the vassal or tenant was bound to render fealty or service to the donor or lord, and the lord was bound to defend the fee against all acts of strangers, and if the tenant was evicted, to give to the tenant lands of equal value. This was technically called a "warranty." If the tenant was sued by a stranger, he vouched the lord to defend the suit, and if he was evicted, he recovered his recompense by his *warrantie chartæ*. If he was sued by the

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lord, or his heir, he rebutted the suit, by pleading the warranty in bar of the lord's right of action. These were originally the only warranties, as the fee was given (316) by livery of seisin, and not by deed. When charters of feoffment were introduced, they had the effect only of preserving evidence of the gift, which yet derived its force and effect from the livery. And every charter which contained the word "dedi," implied a warranty, without an express clause binding the grantor and his heirs. On the introduction of feuds into England, a vassal could not alienate his fee, and therefore the warranty and services were reciprocal between the donor and donee. Subinfeudations nevertheless were soon attempted, and the services being of right due to the lord, to whom the reversion belonged, the grantor was not bound to warranty by implication of law, but only for his own life. This will appear from the *Stat. de Bigamis* 14, *Edw.* 1—*Stat.* 4, *sec.* 6, which is declaratory of the common law. It became therefore necessary for the sub-tenant to have an express warranty. Subinfeudation becoming universal by *Stat. Quia emptiores* (18 *Edw.* 1), a clause of warranty became also a necessary part of the assurance by feoffment; and hence the only distinction between implied and express warranties. The express warranty by deed came instead of the incident to the feudal investiture. By the operation of the warranty, implied, and afterwards expressed, the heir of the donor upon whom the warranty descended, was barred of any right of action for the lands warranted, whether he claimed the inheritance from his father, or by gift from another; and whether assets descended to him or not—the services due upon the gift, being deemed an equivalent for the land. This continued until it was restrained by the statute law.

The first restraining law was passed, 6 *Edw.*, 1, and is called the *Stat. of Gloucester*. By this statute, a husband seised in right of his wife, shall not bar his heir claiming *ex parte materna*, by warranty *without assets*. But the father, tenant for life, was still at liberty to bar his heir of an inheritance claimed from his mother by warranty *and assets*. The next restraining statute, was the *Stat.* (317) *de donis* (13 *Edw.* 1), which prohibited the aliena-

tion of tenant in tail, to the prejudice of his issue and the donor.

This statute does not mention warranty; but it was construed by analogy to the stat. of Gloucester passed seven years before, and the conveyance of tenant in tail with warranty, was held not to be a bar to the issue on whom it descended, but his conveyance with warranty and asset was held to bar the issue; nay so far was warranty respected, that the warranty of any ancestor (except the tenant in tail, who was within the words of the statute) was held to bar the issue, *without assets*. These warranties descending from other ancestors (not tenants) were afterwards called *collateral*. In all cases where the issue by virtue of this statute would avoid the force of his ancestor's warranty, he must resort to the remedy granted by the statute, his formedon in descender; for except by that writ, the warranty of the ancestor was conclusive of the right of his heir, on whom it descended; and upon that writ only, could the alienee of the tenant have benefit of his plea of warranty and assets descended, or of his collateral warranty, if he had one.

The effect of express warranty by deed, is to bind the grantor and his heirs to make recompense to the grantee and his heirs and assigns in case of eviction. If a stranger evict, the remedy of the grantee is by action or voucher. If the grantor, or his heirs, bring suit, to prevent circuitry of action, the warranty must be plead in bar; and where by the statute law the warranty is not a bar without assets, the descent of assets must be averred in the plea, and proved on the issue. This plea in bar, is to prevent *circuitry of action*, which by the law of warranty was anxiously avoided; for at the suit of a stranger, voucher was given, and at the suit of the grantor, the plea in bar, technically a *Rebutter*, was a defence, whereby, in each case, the rights of the party are settled in one action, instead of two.

A rebutter differs from an estoppel in this: that (318) the conveyance of the ancestor estops himself, and those claiming lands under him as his heirs, to claim against his deed, but does not at all estop his heirs not claiming by descent from him, but by descent or gift from some other person, to claim against the deed. A rebutter

would bar the right of the heir however acquired. As if the ancestor has the right of possession in himself, and the inheritance is in the heir, either by descent from his mother, or by purchase from another; if the father convey the lands, the heir claiming by descent from the mother, or by purchase, is not *estopped* to claim against his father's deed; but if the father, before the restraining statute, had annexed a *warranty*, or since had left *assets* to descend with a warranty, the heir shall be *rebutted* of his own right. *Coke on Lit.*, 365.

Before the statutes of 6 *Edw.* 1, & 13 *Edw.* 1, the heir was barred by the warranty of his ancestor, *in all cases*, without assets descended, and since those statutes with assets descended and the issue in tail, by collateral warranty without assets. See *Butler's Note*, 2. *Coke Lit.* 373. *Bole v. Haughton*, *Vaughan's Rep.* 375. *Gilbert's Tenures* 373.

The deed of *Michael Hill* to *John Hill*, doth contain a warranty, and the warranty although in a deed of bargain and sale, will, if assets have descended from *Michael* to his heirs at law (issue in tail) bar the right of the issue. By force of the warranty in the deed of bargain and sale from *Michael* (if assets descended) a new estate in fee is vested in *John* and his heirs, determinable in the extinction of the issue in tail, by the action of the donor in reversion. If assets descended from *Michael* to his heirs, the issue in tail is barred of his right of property, and cannot bring his formedon. And because the deed of bargain and sale, with warranty and *assets*, will convey the estate of which *Michael* was seized, so as to vest in *John*, and his heirs, a determinable fee simple; the same deed and warranty without assets, will convey to *John* and his heirs the right (319) of possession, as against *Michael*, and his heir. If assets have not descended, the issue in tail are entitled to their formedon, under the statute *de donis*; but as *Michael* might *rightfully*, by deed of bargain and sale, with warranty and assets, divest the right of property from his heir (issue in tail) who is not, if assets have descended, protected by that statute, so by the deed and warranty, he may *wrongfully* divest their right of possession from his heirs and convey it to *John* and his heirs, leaving the issue in tail, if they have not assets from him by descent, to re-

vest their estate by action, by the formedon given them by the statute. This is a discontinuance, the deed and warranty conveys the possession and right of possession, which was in *Michael*, to his warrantee and his heirs; but the right of property is in the issue in tail, for which he has an appropriate remedy given him by the statute *de donis*.

It is objected, that the covenant in the deed of *Michael* is not an ancient warranty, but a modern covenant for quiet possession *only*, and this objection is rested on the phraseology of the covenant which is not in the precise words of the ancient charters of feoffment—the deed witnesseth “that the said *Michael* for himself, his heirs, executors and administrators, doth covenant *to warrant*.” The ancient clause is, the said *Michael*, for himself and his heirs, “doth or will warrant.” It is said, that if the present be a warranty, the word executors must be rejected, as the personal representatives were not privies to the ancient warranty, and that the bargainor intended to enter into the covenant for quiet possession, as he has covenanted for his executors. It would be a very unsafe construction to allow the word “to warrant,” which has a technical sense, to be restrained, because the bargainor attempted to bind his executors, even if no reason could be rendered why executors were inserted; but it would be very absurd when the executors were properly bound.

The remedy in this country on the ancient warranty (320) being altered, and the personal remedy of covenant (in case of the eviction of a stranger) being substituted for the ancient one of voucher and warrantæ chartæ, the executors are properly privies, and may be sued. But as to the heir, he is yet liable to be sued in covenant, on the eviction of a stranger, and to be rebutted if he bring an action, and it is therefore proper that whilst the grantor binds his heirs to the ancient warranty, so that his grantee may have the benefit of *rebutter*, that he should bind both his executors and heirs to warrant against the eviction of a stranger. As to the supposed distinction between “a covenant to warrant” and “a warranty,” and a difference between “I do warrant” and “I do covenant and engage to warrant,” it is verbal only.

We know the wording of the covenant is resorted to by the highest authority, Lord Hardwicke, in *Williamson v.*

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Codrington, 1 Vesey sen. 512. But that case turns not on a verbal distinction, but on the broad ground that the covenant applied to personalty and realty, and therefore, could not be taken to be a real warranty, which would not apply to the personalty at all, and the phraseology was merely referred to in aid of the rule of construction "*propter subjectam materiem*," we must construe the covenant in the deed of *Michael*, therefore, so as to give the bargainee the advantage of the warranty in his deed, operating by rebutter, that is the legal result from the words used, is applicable to the subject matter, because that is the subject matter, and is most beneficial to the grantee. But if we could go in search of the meaning of the individuals, parties to this deed, we must suppose that they knew they were creating a rebutter, because they have inserted in their deed a covenant for *quiet possession* against all former *titles* and *incumbrances*, immediately succeeding the warranty, and unless they intended to give to the warrantee a rebutter, by the warranty they were doing an idle thing.

It is said, that if it be a warranty proper, yet as it is in a bargain and sale, that it will not create a discontinuance. (321) It is conceded to us that a feoffment will pass the right of possession, and therefore creates a discontinuance, although a feoffment without warranty and assets will not bar the estate tail; and it is not pretended by us that a conveyance that passed the mere right, will affect the possession, as a release to a disseisor; the release itself only remitting the right to the disseisor. If tenant in tail, therefore, releases to his disseisor, he passes only his own life estate, and on decease of the tenant, his issue may enter; but if he release with warranty and assets descend, he bars his heir, notwithstanding the statute *de donis* in the same manner as if he had infeoffed the disseisor originally, with warranty, and assets had descended, and if no assets descend, yet the warranty in the release, repels the entry of the heir, and puts him to his formedon. *Gilbert's Tenures*, 53, 54—*Litt. Sec.* 598, 599, 600, 601.

So a bargain and sale without warranty, passes the life estate only of tenant in tail, in possession, and on his decease, his heir, the issue of the donee, may enter; but the warranty express in a deed, having the force of a feudal

contract, may be part of bargain and sale, and by such warranty and assets from tenant in tail in possession, notwithstanding the statute *de donis* the issue in tail may be barred. By operation of the statute of 27 *Henry VIII*, chap. 10, called the statutes of uses, the bargainee of a use, hath by the statute, the seisin and possession of his bargainer transferred to him; the whole estate that was in his bargainer; not a seisin in law, but in fact not a right to enter and have the profits, and to call for a conveyance, but the actual legal estate of the bargainer; now we have seen that by means of a warranty and assets, the tenant and tail may lawfully bar the issue in tail his heirs: he may as to them alien the estate tail. He may do so by bargain and sale with warranty and assets descended, and if there be bargain and sale and warranty, it will create a discontinuance, because the fact of assets descended, or not, can be tried only in the real action, by formedon, and until tried, the law will intend that the deed of the (322) tenant is lawful, and that he has given a recompense to his heir; for the estate of which the bargainee is seised, by 27 *Henry VIII*. See *Bacon's Reading* — 176. *Sander's on Uses and Trusts*, 114 last edit. *Cruise*, 1 vol., 423, 424, & *Vaughan's Reports*, 384. The *cestui que trust* is so in of the old estate of the bargainer, that he may as assignee of bargainer, avail himself of a warranty in a former deed.

That a bargain and sale will create a discontinuance, see *Butler's note*, 1. *Coke Litt.* 320. *Gilbert's Ten.*, 117, 120.* It is said however, that the question of discontinuance is not open, that the present defendant, tenant in tail, recovered a term for years in an action of ejectment, and was thereupon, *remitted* to his ancient estate. If there was a discontinuance (and it is supposed in the argument) the recovery of the term would not remit the discontinuance to her estate tail. The discontinuance had a right remediable by real action only, whilst the freehold, in con-

* *Note*.—After the argument, one of the Court referred the counsel for the plaintiff to the case of *Doe v. Westwidge*, 4 *Maule & Selwyn*, 181. It is an authority to show that the covenant in the deed of *Michael Hill* is an ancient warranty, and not a covenant for quiet possession, and further, that a warranty in a release, a conveyance operating without warranty to pass the right of the releasor only, will by force of the warranty create a discontinuance of an estate tail.

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temptation of law, was in *John Hill* and his assignees. If an entry congeable be in one person (that is the right to the possession) and the actual possession be in another, and the person having the right to possession get the actual possession, either by entry *in dais*, or by recovery in ejectment, he shall be remitted to his old estate. So it is if a person have a right remediable by real action, if the *freehold* be cast on him by act of law, or by recovery, he shall be remitted to his ancient estate; but one having the actual possession merely for a term of years, where the freehold is tortiously in another, cannot be remitted to his ancient estate by operation of law. He must, by recovery or otherwise, destroy the tortious freehold. By the recovery in ejectment, *Elizabeth Jacocks* showed only that she (323) had a term for seven years from the day of her demise, which had expired before the present suit brought. *Co. Lit.* 349, a. 8 *Bl. Com.* 19, *Gillb. Rimiter. Preston's Law Tracts*, 45.

The plaintiff's entry or formedon was barred by the act of 1715, before *Mrs. Jacocks* brought her ejectment in 1818. *Michael Hill* by deed conveyed the estate in 1748, to *John Hill* and his heirs; *Michael* died in 1760. If there was a discontinuance, the heir of his body issue in tail of *Elizabeth Hardy*, had his formedon, if there was no discontinuance, his heir issue in tail, had his right of entry in 1760, and in seven years would have been barred by the statute of limitations of 1715, unless within its savings: *Hardy Hill*, the issue in tail, having the right in 1769, was born on the 21st of February, 1756, and was at his father's death an infant of four years of age, and was, therefore, within the saving of the statute, and had three years after he came of age, that is after 21st February, 1777, to bring his suit. He died 5th September, 1777, being of full age, leaving *Elizabeth Jacocks*, his daughter and heir, and issue in tail of *Elizabeth Hardy*, born 15th January, 1776, and the question is, whether this second tenant of the right of action or entry, is within the saving of any statute—she married *Jonathan Jacocks* 17th March, 1791; he died in 1810, and she brought her suit within less than three years after her discoverture. This Court having decided that cumulative disabilities supervening; as coverture upon infancy in the same person having a right to a personal ac-

tion, are within the saving of the act of 1715, section 9, so that the person must be entirely free from disability before the three years will run in a personal action; we will not enquire into the effect of her marriage, but pass it over with the single remark that the proviso in personal actions, and that as to the right to land is differently worded; and confine the argument to show that *Elizabeth Jacocks* (personally) was never within saving of the statute; but as the representative of *Hardy Hill*, was obliged to enter or bring suit; as *Hardy* her father was. But (324) for the act of 1783, chap. 187, *N. R. Hardy Hill* must have brought his action 21st February, 1780, in three years after he came of age; by this last act he and his heirs might bring it within three years after 1st June, 1784, that was first of June, 1787—does the fact that he died 1777, having a right by the statutes of 1715 and 1783 to bring his suit any time before 1st June, 1787, give the defendant *Elizabeth*, the next tenant in tail, a right to bring her suit within three years after all her disabilities removed? The purview of the statute of limitations intends only to bar the remedy of him whose estate is turned to a right by the commencement of the adverse possession—and to bar the remedy of him, who by some former gift hath a right expectant upon some outstanding particular legal estate for years or for life, from the time such legal estate expires and such expectancy vests in right of possession or action so as to entitle him thus in remainder or reversion, or being issue in tail, to make his entry or bring his suit against him in the adverse possession. For instance, if *John Hill* had taken tortious possession with color of title against *Michael*, the statute would have begun to run upon *Michael* and his heirs, and in seven years, their remedy would have been barred, and if *Michael* had died before seven years, his heir, although an infant, must have claimed by suit or entry within seven years—as *Michael* had a life estate and transferred it to *John—Hardy*, the issue in tail, having right of entry or suit expectant upon *Michael's* life estate; if *Hardy* had been at the death of *Michael* (1760) of full age, his heir *Elizabeth*, must have entered or claimed within seven years from 1760. We admit that *Hardy* being at his father's death an infant, had until his full age and three years thereafter to enter, and

that if he died under age, his heir, if under no disability, should have at least three years from his death, to enter or claim, and if less than four years of the seven had expired then he should have the residue. At least seven years are required for a bar, and in case of disability, the person (325) son disabled and his heirs, shall have seven years, and if the seven years or four of the seven be expired, shall have three years added—except a person beyond seas, who must by himself or his heir, enter in eight years.

Our argument is, that there is no saving for the heir of a person not under disability, whose estate was turned to a present right of possession before his death, but that his heir, though under disability, at the time of the descent, must enter, and this has never been denied. Further, we insist if a tenant under disability die, having a present right of entry, and his right descend to an heir under disability that there is no saving for this second heir, because of his disability; but he must enter under the saving in favor of his ancestor, within three years of his death, if seven years have elapsed in all, as his heir of full age must do;—we insist that this is the true construction, because in the act his heir not under disability and those under disability, are put on the same footing. The purview of the statute clearly proceeds on the common law notion, that “*heares est pars antecessoris*” and therefore the non-claim of the ancestor, bars the heir, and the saving is framed on the same notion that the non-age or other disability of the ancestor shall have the right of entry to the ancestor and his heirs; but the disability of the heir of a disabled ancestor is not mentioned in the statute; but *he*, as an heir not under disability, must take advantage of the saving as the ancestor himself might, the saving is personal to the ancestor, and the heirs are within the saving, as his representatives. If the ancestor be an infant under fourteen years, he may have his minority and three years after; if he be eighteen years or more, he shall have full seven years from the time the possession was adverse to his right—so his heir, whether under disability or not, if his ancestor died having less than four years, no claim against him shall have the full seven years, although it be more than three from the death of the ancestor; but if seven years

(326) have expired more than four years thereof, before the death of the disabled ancestor, his heir shall have three years from the death of the ancestor. Although there be not in our statute any thing about the death of a person under the saving; it must be construed that the disability terminates *by the death* as well as by the efflux of time, otherwise the heir being under no disability of a person dying under age, or other disability, must have seven years after the death of his disabled ancestor, although the ancestor himself surviving, his disability would have but three, which could never be the intention of the legislature.

The distinction, that persons having a present right and a disability to make claim, shall be saved from the operation of non-claim, and that persons acquiring a subsequent right, and being under the disability at the time such subsequent right *first* accrues, shall be also saved from the operation of non-claim, and that no other persons but as representing such disabled persons, shall be within the saving, in common to all the statutes made for the limitation of suits and for quieting possessions; and in none of the acts is the saving extended to but *one* disabled person claiming in the same right, and to his representatives claiming within the same time given to him. By the act of 4 *Hen.*, 7, c. 24, a fine and five years non-claim, concludes all strangers, *except* women covert, infants, persons non compos, in prison and out of the realm, who have right at the time of the fine levied—they and their heirs to claim in five years after full age, discoverture, &c., else to be barred—other persons (not having a present right) to be concluded by the fine and five years non-claim of such rights as may *first* accrue to them after the fine, by force of any gift in tail or other matter before the fine; and if any such person, at the time of such action accrued, be under twenty-one, covert, non compos, in prison or out of the realm, such persons and their heirs to have five years next after they be of age, discover, &c., to bring suit, and if suit be not brought by them and their heirs, the fine to be a perpetual bar.

By this statute, a *person* having right at the fine (327) engrossed, and being under disability, is excepted,

so that he and his heirs bring suit in five years after such *person* be free from disability.

The same of a *person first* acquiring right after the fine if under disability; suit to be brought by him and his heirs after *he* came to the age of 21, &c. By this statute, it is not material in what condition the *heir* of the *person* disabled be, there is no *farther* saving for such heir—*personally*, he must claim in five years after the disability of his father. The purview concludes *all* strangers; the saving extends only to the first tenant of any line of persons entitled to the right, and to his heirs who may enter in the time allowed to them by the saving.

The act of the 32 *Henry VIII*, c. 2, limited writs of right to sixty years of seisin in fact from the test of the writ—formedons to fifty years—and writs of assize on the disseisin done to an ancestor, to fifty years—and to the person suing for a disseisin done to himself, for thirty years. There is a saving of six years only to the persons having right, and being at the passage of the act under twenty-one, covert, in prison, or out of England, so that such persons sue within six years after such *person now* being within age, shall attain twenty-one within six years after such *person*, now being covert de baron, shall be uncovert, &c.

And there is an express proviso, that if such person die under the disability saved, or within six years allowed him or her, that his *next heir* shall have six years after the death of such person.

The statute is remarkable for the express shutting out, cumulative disabilities of the persons within the saving, and for giving the *next heir* by express enactment, six years to bring suit, after the death of his ancestor, dying under the disability, or within the six years allowed. If not helped by the express proviso, the next heir would have been barred.

By the statute of 21 *James*, 1, c. 16, from which (328) our act was probably taken, writs of formedon and entry are limited to twenty years after the then parliament, or within twenty years after such right of action or entry should accrue. The act contains a proviso, that if any person shall be, at the time such right or title first accrued, within twenty-one, &c., then *such person*

and his heir shall, notwithstanding the said twenty years be expired, bring his action, or make his entry, as before the act, so as such *person* and his heirs, within ten years next after his full age, &c., or death, take benefit and at no time after the ten years.

From the wording of this statute, it is manifest that the *person* (or persons, where there is more than one tenant) *having* a right at the time of the adverse possession taken, or *first* acquiring a right after such adverse possession, and being under a disability at the time of such right accruing is protected for twenty years as all other persons, and for ten years after the termination of the twenty years (notwithstanding the said twenty years be expired), so that he and his heirs bring his suit or enter in ten years after the disability removed or terminated by the death of the party and at no time after the ten years, the word *death* being inserted in this act, from the greater caution, it having been omitted in the statute 4th *Henry VII.*

Then comes our own act, which does not provide that the person under disability and his heir, may enter or sue within three years after full age, &c., but that the party himself personally shall enter, nor does it provide by express words, that the disability shall terminate by the death of the party, but provides that the party after full age, discoveriture, &c., may claim; but we must necessarily give the same construction to our act as if it had been provided like the statute of *James*, as it would be too rigid not to allow the heir to enter if his immediate ancestors should die under disability, and too loose to give an heir, being of full age and under no other disability, (329) seven years after his ancestor's death (the seven years having expired), then the ancestor himself would have had but three years. In this act as in the British acts, from which it was doubtless borrowed, the right is saved to a tenant, having disability at the time of the adverse possession commenced, or to the ancestor of a line of inheritable heirs, such ancestor *first* acquiring the right and being under disability at the time of the acquisition; but no notice is taken of the disability of any "heir" in the succession to the right from such ancestor in any of the acts, and in our statute the legislature expressly declares that their object in passing the act is "to prevent

the expectation of heirs leaving much land unpossessed and titles perplexed.”

The argument submitted by us on the operation of the statute, will be supported by the reasoning of the majority of the Court in *Stowell v. Zouch*, 1 *Plowden*, 355—which was a case arising under the statute of 4 *Henry VII.*, chap. 24, before referred to, and by *Doroure v. Jones*, 4 *Term*, 300.

It is laid down as law expressly by the King's Bench, in *Doe v. Jessup*, 6 *East*, 80—that the disabilities of successive tenants are not within the saving of 21 *James I.*, and it is held by them the second being heir of the first tenant must bring suit within ten years of the first tenant, twenty years in all having expired.

There is a case, 4 *Taunton*, 326, *Cotterell v. Dutton*, where, as in *Doe v. Jessup*, the demandant did not bring his action (a formedon) until more than ten years after his non-disability ceased. The Court are reported in *Cotterell v. Dutton*, to say, that the ten years do not run at all where there is a continuance of disabilities. It will be found in looking into that case, that it is very badly reported, that the Court were clear on the point, that the demandant was barred by his own laches and non-claim so that they would not hear the argument for the tenant, and that although the case of *Doe v. Jones* is found fault with

by *Lens*, counsel for the demandant, the Court intimate no opinion that they would overrule it if necessary, and that the opinions delivered by the Judges are very short (and as reported), carelessly worded; so that this case, in which the Judges give no reason for their construction of the proviso in 21 *Jac.*, 1, chap. 16, will not weigh against the opinion of the Court of King's Bench, in 6 *East*, given at length, and apparently with deliberation.

The construction we have put upon the statutes, derives great support from the opinion of KENT, in *Demarest v. Wyncoop*, 3 *John.*, c. c. 129, and from that of PARSONS, in 4 *Mass.* 182, and from 4 *Day*, 289 and 300, which decide that the cumulative disabilities of one tenant are not protected—and it would seem, from the statutes themselves, that it is much more apparent that the disabilities of successive tenants are not protected. If we were permitted

to consult the policy of the law, since the abolition of primogeniture, and permitting all the children to take lands by descent, it is more necessary to give a rigorous construction to the statute; as titles will be so perplexed by the disabilities of numerous tenants, that scarce any length of possession will be free from the claim of persons protected by successive and cumulative disabilities of some unknown heirs. In the present case, through a succession of single heirs, there has been an adverse possession of fifty-three years, before the first suit brought, from 1769, and the defendants had purchased in fee and been in possession twelve years before 1760. The quiet of titles is a sufficient answer to the many supposed cases of hardship, and the heir of a disabled person is under no greater hardship than the heir of a person not under disability, against whom the statute does operate confessedly, although the adverse possession commenced one day before his ancestor's death—besides the disability of the heir is not absolute in fact, there being almost always persons interested to take care of his rights, and the eviction of a purchaser for full price after sixty-seven years improvement, is one of no small hardship nor will it be of infrequent occurrence if the statute (331) be extended by *equitable construction to save the disabilities of successive tenants.*

TAYLOR, C. J.—Having formerly given an opinion in this case, which I do not, on reflection, see sufficient reason to change, I can only refer to it. I still think that the deed contains nothing more than personal covenants, and no one of them could have the effect of rebutting the plaintiffs. On the point of successive disabilities, I concur entirely with my brother HENDERSON. I am therefore relieved from the necessity of giving an opinion on the question, whether a bargain and sale can, under any circumstances, operate a discontinuance. Following in the course of instruction transmitted to us by those men who have written on the subject, I should think that if a warranty is annexed to a bargain and sale, covenant to stand seised, or release, it may produce a discontinuance. Yet, as I have heard no argument on the subject, I am not prepared to say, what alteration may have been effected by our particu-

lar system. In this case, I am of opinion the judgment should be affirmed.

HENDERSON, Judge.—In this case, it is not pretended that the right of the defendant is bound, the objections go to the remedy only.

It is objected, first, that the deed of bargain and sale from *Michael Hill*, the tenant in tail to *John Hill*, of 1746, created a discontinuance of the estate tail on account of the warranty attached to it, and that thereby the heir in tail is put to her formedon to recover her estate tail, and cannot regain possession thereof by entry or action of ejectment.

It is objected, secondly, that the defendant is barred by the statute of limitations.

A bargain and sale is a rightful conveyance; the statute transfers the seisin of the bargainor to the bargainee; (332) such a seisin, such an estate as the bargainor had, is transferred to the bargainee. I speak not as to parties, but as to strangers—that is, those not claiming under either of them. A feoffment is called a wrongful conveyance, because it passes, even as to the whole world, what it professes to pass. It is true, if the feoffer had not the rightful estate, the estate which he passed, may be put an end to by him who has the rightful one, but it continues till it is put an end to. If tenant in tail, therefore, bargain and sell the entailed lands in fee, it is not a discontinuance of the entail tail, for that is a *separation* of the *right* from the *estate*; for the issue in tail claims not from the tenant in tail, but *per formam doni*; he is therefore a stranger to the bargainor, and as to him, the bargain and sale passes only an estate for the life of the bargainor, his estate *remains* still in him, he is not put to an action to *recover* it, for he has not *lost* it—he may *enter*, which is the touchstone by which is ascertained whether an estate is lost or not; for if the tenant is disseised, and has not, by a descent or otherwise, lost his right of entry, he may compel the lord to avow upon him, and in all respects recognize him as his tenant, as one having an estate; nor can he, so long as his right of entry remains, at his election throw off his estate, the lord may avow upon him as his tenant, and compel him to perform his services. And his right of entry will support

a contingent remainder dependant on his estate as the precedent freehold, and as the issues in tail after the death of the bargainor may enter (which is not disputed by any one), it proves beyond a doubt, that the estate tail is in him, and not in the bargainee, that is, that the bargainee has no estate of any kind, for there cannot be two persons on the same estate at the same time, holding adversely; there may be titles innumerable, but more than one estate at the same time there cannot be; and if it is in the issue in tail, it is not in the bargainee. There is then no separation of the right from the estate, they both are united in the issue, there is no discontinuance.

(333) These principles are not controverted by a single writer that I know of. But a feoffment made by a tenant in tail, is a discontinuance; for a feoffment passes not only what the feoffer can rightfully pass, but what it professes to pass. The estate is therefore in the feoffee, and if in him it is not in the issue in tail, who has nothing but a right to the estate tail. There is a separation of the right from the estate, there is a discontinuance, and if a warranty is added to the feoffment, and it descends on him who is issue in tail, as heir of the warrantor, unaccompanied with fee simple assets, equal in value to the entailed lands, the issue in tail is barred by means of the warranty and assets combined—not upon principles of strict right, but of policy and convenience, for the sake of quiet and repose, to avoid circuity of action. The discontinuance does not affect the right, but affords to the party an opportunity of showing that which does. That the warranty and assets form no bar to divest, is clearly proven by this: If the issue in tail should enter, an action cannot be sustained against him on the warranty and assets; and even where there is a discontinuance, and the entry of the issue unlawful, yet if the feoffee brings a writ of right, in which action the true right is tried, the issue will prevail; which proves, that it is the avoidance of circuity of action which forms the bar. This accounts for such expressions as those to be found in all books, that it works a discontinuance—that it amounts to a discontinuance—if it only barred it—it is not one of itself—if it is not one of itself, it is made so by construction for particular purposes—when those

purposes are answered, or when they were never active—the thing is as it is—it is itself.

I will next endeavor to show, that it derives no aid from the warranty in discontinuing the estate; a warranty is a covenant *annexed to an estate*. Without an estate there cannot be a warranty. When no estate passes by a deed, and the grantee had no estate before, the warranty is a nullity. If an estate is made to a man for life, with (334) a warranty to him and his heirs forever, the warranty determines with the life estate. A warranty is that which protects the estate, it entwines itself around it, and must fall to the ground with it. It is true, that it is not necessary that a warranty should be annexed to a deed which passes, or even professes to pass an estate, even right, provided the warrant has at the time an estate to which the warranty can attach itself; it may have passed from the warrantor before, or even from a perfect stranger.

It may be now safely asked, does the discontinuance arise from the warranty or bargain and sale, or both combined? It does not arise from either separately, and there is no estate in the bargainee after the bargainor's death, with which the warranty can combine or unite; in truth, it cannot be a discontinuance, unless we entirely change the nature of the thing. I am not unapprised of what is said by *Chief Baron Gilbert* in his *Tenures*, on this subject; but with deference to the learned Judge, I think he is mistaken. Let his remarks pass for as much as his argument is worth. He says, that the statute *de donis*, by prescribing the action for formedon, intended that the issue in tail should be put to his action, and if so, I have already admitted it as a discontinuance, for then there is a separation of the right from the estate. This is a strained construction, entirely unwarranted either by the letter or spirit of the act. It is true the formedon is prescribed; but that is where the issue has lost the estate, and seeks to recover it, not where he has not lost and may enter. It is a remedial act, intended to redress the wrongs which were committed on those conditional fees; and it would be strange, by a forced construction, to deprive them of a right secured to them, or if you choose given, *de dono*, by the statute, this is of entering whenever they have the estate. It is further to be observed, that when the statute was passed,

there was then no conveyance of an estate but those which operated by way of transmutation of possession, (335) either such as carried the possession and estate with them, or such as recognized a previous possession and estate in the grantee.

I am therefore satisfied, that a warranty attached to an estate, created by a bargain and sale, made by a tenant in tail, is not a discontinuance, nor in this country does it work one, it does not work one for the inconvenience is the other way, for if she has right, and a discontinuance, if worked against her, she cannot enter, she cannot bring an action of ejectment; for when she cannot enter she cannot bring ejectment; let her bring her formedon it is said, or some other real action. I should ask where, before what judge, what attorney shall she employ, what clerk apply to for process, for there is not a man in North-Carolina who ever brought such an action as lawyer, or tried one as judge, or issued process as clerk, or was present when one was tried, or knows any thing about the manner of proceeding, and all these difficulties the defendant shall encounter, rather than put the plaintiff to his action, upon the warranty against the heirs or executors of, I will add, *Michael Hill*; and although in this particular case, there would be great difficulty in reaching the assets of *Michael Hill*, from the great length of time, if he left any, and it does not appear that he did, yet the abstract question is now before us, and if it is a discontinuance in this case it is so in all. I mean not to express an opinion whether any of these old real actions can now be brought, it is sufficient in settling a question of convenience, that these difficulties are to be encountered. In truth, it would be a mere mockery of justice to say to the defendant, you have a right, but for the convenience of a person who does not show as yet that he has any title, you must resort to some of those old remedies. We must conclude that either she has great demerits or that her adversary has great merits. The point made by her counsel upon the effect of her late recovery in ejectment against the now plaintiff, to-wit: that she is remitted thereby to her former or (336) rather better estate, were it necessary to express an opinion on it, I should say that she is not, for if a person has lost the right of entry, by any means acquires a

term for years in the land, there still remains a tenant of the freehold to answer to his action, the law is not reduced to the dilemma of saying either that he must abandon his right or sue himself, there still remains notwithstanding the term of years, a freeholder against whom he may bring his action, which puts an end to the claim for a remitter.

On the second point, the statute of limitations, I think that the English authorities as far as they go, even on the construction put on the statute of *James*, which is somewhat different from our statute, are in favor both of cumulative and successive disabilities. I know of no case in point, for the question did not arise either in the case of *Doe v. Jessup*, 6 *East*, 80, or in *Cotterell v. Dutton*, 4 *Taunton*, 826, in both those cases, more than ten years had elapsed after the disabilities had ceased; but it must be admitted, from what was said by the Court in the case of *Doe v. Jessup*, that the disability of the plaintiff would have been disregarded. Although the right had descended from an ancestor who had been under a continued disability, yet in the case of *Cotterell v. Dutton*, the whole Court expressed themselves in very decided language to the contrary. CHAMBRE, Justice, saying, that the ten years do not run during the disabilities, and *Lens*, Sergeant, who argued for the plaintiff, said that the case of *Doe v. Jessup* was decided contrary to the apprehension of the profession. In *Stowell and Zouch (Plowden)*, it was decided, after much argument, and not without a diversity of opinion on the bench, that when the statute *begins* to run, it continues to do so, notwithstanding any supervenient disability. If supervenient disabilities are entirely disregarded, the statute would run over them whether it had commenced running before they arose or not. The maxim would then be, that the statute disregarded all supervenient disabilities—not when it begins to run it continues to run, regardless of (337) such disabilities. The maxim as it stands, presupposes a time when there was no disability; it then commences and having commenced it continues, for to prevent the operation of the enactment there must be a disability at the time the cause of action accrued. If there then was, the time allowed in the saving, looked to the removal of the disability; for disability, and not the lapse of time, was regarded in the saving—the lapse of time had

been provided for in the enactment. To show that disability, and not time, was regarded in the saving, a person who was only one day old when the cause of action accrued, has the same period after full age to assert his claims, as one who was twenty years and eleven months old. To any one who will read the case of *Stowell v. Zouch* (and that case has never been charged with favoring disabilities—it has indeed been many times struggled against on the other side), will perceive, I think, that the infant heir would not have been barred, had not the statute commenced during the time of his ancestor, that is, at one period after the cause of action accrued, his ancestor was not under any disability; the time in the saving then began to run, and but for that, the unanimous opinion of the Court would have been the other way; and from analogy to the common law on the subject of disabilities, I think the Court would have been well warranted in such opinion.

At common law, a feme sole of full age is disseised—and then taketh husband, and a descent is cast, neither she and her husband, nor she after his death, shall enter on the heir of the disseisor—for before her marriage she was under no disability, and might have entered. But if an infant feme be disseised, and before full age take husband, and then descent is cast, she shall after discoverture, enter upon the heir of the disseisor, and so may her heir if she die during her coverture. *Coke Lit.* 246. It is admitted, that the analogy is not perfect, but it is sufficiently so to warrant the Courts in saying, that disability, and (338) not time, is regarded in the saving of the statute.

The case of *Stowell & Zouch*, was decided on the saving in the statute of fines, and it was never formally applied, I believe, to the statute of *James* until the time of Lord KENYON, 4 *Term*, and in the case of *East*, it was charged by one of the Court, that the words or death, was inserted in the statute of *James*, which is not in the statute of fines, and that it was inserted in the statute of *James* to do away all doubt, but even those expressions had no effect in the case of *Cotterell v. Dutton*. They are not in our statute, the statute of *James* also saves the right to the heirs, ours does not, it is given to them by construction, and very properly, for it surely could not be intended to make the right purely personal, and if it is right to modify it by con-

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struction in one particular, it is in another; it has been modified by construction in another part, and universally approved of: By the words of the statute, an infant has three years after arriving at full age, to make his entry or claim, should he die before he arrives at full age, is his right lost to his heir, or is the defendant never to be quieted in his possession? The case mentioned in the statute, arrival at full age, has never occurred—yet it was never doubted but that his heir, if under no disability, had the balance of three years yet to run to assert the claim, and if under disability, I have endeavored to show three years after the disability was removed.

The first heir in tail after the death of the ancestor, who aliened *Michael Hill*, and who was the last person seised of the estate in tail, being when the right devolved on him an infant, and that heir dying before the disability was removed, leaving an infant heir, who became covert before full age, who having brought her action within three years after her discoveriture, I am of opinion that she is not barred by the statute of limitations—that is, that she comes within the saving of the act.

I shall not examine the question, whether the (339) deed of 1746 contains a pure warranty, or only a covenant? This opinion is given on the supposition that it is a warranty; but on this point I express no opinion.

I have said, in the foregoing part of this opinion, that he who has the right of entry has the estate, and by a disseisin, the disseisee does not lose the estate. I should have added, unless at his election, which he makes by bringing an action for it—for by demanding the estate of another, he allows that the other has it, and thereby admits that he has it not himself.

I have viewed this case as if there was a warranty in the deed; whether the covenant amounts to one, or not, I have not deemed necessary to examine.

BY THE COURT.—Let judgment be entered for the defendant.

CHAIRMAN OF WASHINGTON COUNTY COURT, to the use of
Armistead, v. HARRAMOND et al.

From Washington.

A judgment obtained against a deceased person during his lifetime, and a second judgment obtained thereon against his administrator, after his death, is both as to the administrator and his securities, evidence of a debt due by the intestate; but it is not evidence against the securities that the administrator has or had *assets* to discharge it.

But if the administrator has returned an inventory, such inventory is *prima facie* evidence against the securities of assets to that amount.

William B. Harramond, the defendant, had been appointed by Washington County Court administrator upon the estate of *Benjamin Fessenden*, and the other defendants were *Potter*, one of his securities in the administration bond, and *Flower* and *Fagan*, administrators of *Webb*, the other security.

This action was brought upon the bond, and upon the trial before NASH, Judge, the real plaintiff, after proving the bond, gave in evidence the record of a judgment (340) obtained by him against *Fessenden* in his lifetime, which was objected to, but received by the Court. He further produced the record of a judgment obtained by him on the judgment last mentioned, against *Harramond*, as administrator of *Fessenden*, on which an execution had issued against the goods and chattels of *Fessenden* in the hands of *Harramond*, which was returned "*nulla bona*." At the succeeding term, the plaintiff and *Harramond* corrected by an entry on the record, a mistake which had been made in the calculation of the amount of the judgment against *Harramond*, an alias issued for the amount as amended, and was returned "*nulla bona*." Plaintiff's writ issued before this last execution was returned.

The plaintiff further produced the inventory returned by the defendant *Harramond* as evidence of assets in his hands.

The defendants, *Potter* and the administrators of *Webb*, offered in evidence certain bonds, notes and open accounts against *Fessenden*, which, as they alleged, *Harramond* had paid before he had any notice of the judgment against his intestate. The evidence was rejected, and the Court in-

structed the jury that the record of the judgment against *Harramond* was no evidence against the other defendants.

The jury found a verdict against all the defendants, and the case stood here upon a rule to show cause why there should not be a new trial.

Gaston & Hogg, for plaintiff.

HALL, Judge.—The judgment obtained against the defendant's intestate (*Harramond*), as well as that obtained against *Harramond* himself as administrator, is evidence of a debt due from his intestate, and he is bound by such evidence. The securities of *Harramond*, the other defendant, are not concerned in interest, whether such debt is due or not; because if the assets are not liable to creditors they are subject to the claims of legatees; and the administrator, *Harramond*, is as much bound for the faithful (341) administration in the one case as in the other, and it is only for the faithful administration of the personal estate by the administrator, that his securities are bound.

But although the judgment against the administrator is evidence against him, of a debt due by the intestate, and is evidence also of assets in his hands to discharge it; and although for the reason before given, it is also evidence of a debt due, as far as it relates to his securities, yet it is not evidence against them that he has assets to discharge it, and thereby subject them to the payment of the debt, in case *nulla bona* is returned on an execution against the administrator. Whether the administrator has wasted the assets or not, is an enquiry in which the securities are interested, and the judgment ought not to be introduced as evidence of the affirmation, because they are neither parties or privies to that judgment. This principle was laid down in *McKellar et. al. v. Howell & Campbell*, ante 34.

But as to the question of assets, I think the securities are bound *prima facie* by the inventory returned by the administrator. They have stipulated in the administration bond that the administrator shall return a true and perfect inventory of the personal estate, and that he shall well and truly administer it, according to law. This is for the benefit of creditors and legatees, and when it is done, it should be evidence *prima facie* against them, of assets, to

that amount; as evidence of the faithful administration of such assets, would be evidence for them.

In the case of the *Chairman of the County Court of Mecklenburg v. Springs* (10 N. C., 43), the judgment was certainly evidence to prove that a debt was due from the estate of *Henderson*, the intestate, to the plaintiff; but it was not admissible against the defendants, the securities of the administrator, to prove the fact, either that the administrator had assets or had wasted them; because if this was the case, they were liable for the amount; and that fact ought not to be proved by a judgment and proceeding, to which they were neither party nor privy; and it appears that it was in part offered in evidence for that purpose, and that that was the reason why an appeal was taken to this Court; for it does not appear that any other evidence was offered to prove assets in the hands of the administrator, or that he had wasted them. It is stated in the manuscript returned to this Court that the judgment with *other evidence* was offered, &c., but it does not appear what that other evidence was; we cannot take it for granted that it established assets in the hands of the administrator, and that the judgment was offered only to establish the fact, that a debt was due. If this was the case, it was admissible, but not to prove assets in the possession of the administrator, or that he had wasted them. For these reasons, I think the rule for a new trial, &c., should be discharged in the present case, the judgment was evidence of the debt, the inventory evidence of assets, &c.

The rest of the Court concurring,

Judgment affirmed.

Approved. *Jones v. Biggs*, 33 N. C., 412; *Strickland v. Murphy*, 56 N. C., 242; *Bond v. Billups*, 53 N. C., 423; *Brown v. Pike*, 74 N. C., 531; *Lewis v. Fort*, 75 N. C., 251; *Speer v. James*, 94 N. C., 417; *Grant v. Reese*, 94 N. C., 720; *Morgan v. Smith*, 95 N. C., 396; *Leak v. Covington*, 99 N. C., 559.

BROWN v. GRAVES.

BROWN v. GRAVES.

From Caswell.

A. made a deed of trust to satisfy several creditors; after this, part of the property is levied on and sold under execution: The sale passes nothing. A. had not such an interest as could be levied on under our act of 1812, subjecting equitable interests to execution.

This was an action of *trover* to recover the value of two oxen. The writ issued October 23, 1823, and the following appeared to be the case:

The plaintiff claimed title to the property under a deed of trust executed by *Zacharias Groom* to *William Russell*, for the use of *Philip Pierce* (who was *Groom's* security), dated 22d of November, 1821, and by the trustee, he proved on the trial, that on the 11th of February, 1822, a sale was made under the trust deed, at the house of (343) *Groom*; that the land mentioned in the deed sold for \$280, the mare for \$32, the oxen (now in controversy) for \$32. These articles, except the mare, were purchased by the plaintiff, who retained the purchase-money in his hands; the mare was purchased by some other person, and the money arising therefrom was paid over to the plaintiff. There was also a quantity of tobacco mentioned in the deed of trust; this had been carried off by *Groom* and sold, except some trash tobacco, which was bought by the trustee for \$2. At the time of sale, the plaintiff and *Pierce* forbid *Swift & Martin* (to whom the debts mentioned in the deed of trust was due, and for which debts *Pierce* was *Groom's* security) to bid for any of the property, unless they paid the money down for the bid, and stated that if they bid the amount bid, should not be paid by their entering it as a credit on the sums respectively due to them from *Groom*.

It also appeared, that before this sale, defendant had informed the trustee, that he had purchased these oxen at a public sale made by virtue of an execution which he had against *Groom*; that at the sale defendant claimed them, and requested the trustee to sell the other property mentioned in the deed first; that he mentioned it to the plaintiff and *Pierce*, who insisted on his first selling the personal property, and he did so.

Groom swore that he and *Pierce* agreed to sell the property before the debts to *Swift & Martin* became due; that he owed the plaintiff by bond about \$109; that he did not know what had become of the money plaintiff received from the trustee, for which the property was sold, nor had he ever agreed that plaintiff should apply it in satisfaction of his debt of \$109; that the steers remained in his possession two or three days after the sale, plaintiff on the day of sale telling him to keep them until he, plaintiff, called for them, and that they were taken away by defendant. He further proved, that he remained in possession of the land, from the day of sale up to the time of trial, and it

did not appear that he was to pay any rent for the (344) place. It further appeared, that the oxen were in *Groom's* possession up to the 11th of February, 1822.

Swift proved that the plaintiff had a bond on him, and after the sale, on the same day, he and the plaintiff agreed, that the claim he had against *Groom* and *Pierce* should be credited on his bond to plaintiff; and they were afterwards so settled. He also stated, that he had never called on *Groom* or *Pierce* for the money due him before the 11th of February, 1822.

It also appeared that *Martin* never made application to have his debt paid before or at the time of sale.

The defendant insisted that plaintiff could not recover, because,

1. The sale was fraudulent, it having been made to hinder the collection of *Groom's* debts, upon which judgments and executions had been obtained.

2. That the trustee by the terms of the deed, had no authority to sell before the debts became due.

3. That defendant's purchase under execution, on the 29th of December, 1821, before the sale by the trustee, gave him the title.

4. That if defendant had not the legal title it was in the trustee, and therefore plaintiff could not recover.

Defendant then offered evidence of his having regularly purchased at execution sale on the 29th of December, 1821, under an execution dated 18th of December, 1821, issuing on a judgment obtained December 15, 1821.

To the charge of the Court on the question of fraud, no exception was taken. His Honor Judge Norwood further

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charged, that although *Pierce* could not direct the sale of the property before he was called on for the money, yet that *Groom* might direct it before the money became due on the judgments mentioned in the deed, notwithstanding that at the time there might be other judgment creditors who had executions; and that if he directed the trustee in this case to sell on the 11th of February, 1822, it would be valid.

And further, that the sale under execution of (345) Dec. 29, 1821, having been made before the debts mentioned in the deed of trust had been satisfied, was unauthorized by law, and passed no title to the purchaser; that if the debts mentioned in the deed had been satisfied by a sale of part of the property, the remainder of the property would then be subject to execution; but not otherwise.

Verdict for plaintiff, new trial refused, judgment and appeal.

Badger, for appellant.

Hogg, contra.

HENDERSON, Judge.—This transaction, upon its face, bears evident marks of a fraudulent contrivance between *Graves*, *Russell & Groom*, to give to *Brown* a fraudulent preference in the payment of the debt which *Graves* owed to him, or to cause *Graves's* property to vest in him in fraud of creditors. If the object had been to give *Brown* a preference, and that object had been fairly, and with good faith effected, the law would not have annulled it. The fraudulent design is evidenced throughout the whole transaction; the expediting the sale at the instance of *Graves*, and more especially by prohibiting the *cestui que trust* under the deed, by virtue of which the sale was made, from bidding at the sale; they could not have been objected to as not being good bidders, for the money was coming to them: The only object which can properly be assigned, was to prevent competition, and thereby enable *Brown* to purchase the property at a reduced price; and if such was the object, of which a jury were the proper judges, the law pronounces the sale to be fraudulent; yet as the sale was made by the trustee, who had the legal title, and at the instance of *Brown*, the property passed as to all but

those whose rights or interests were affected by the sale. The defendant does not claim under the trust deed, either as *cestui que trust*, or purchase, it is therefore not necessary to decide whether, if he stood in that capacity, he could avail himself of the fraud to defeat the sale.

(346) He claims as a purchaser at a constable's sale, under a justice's execution against *Graves*, issued and levied after the sale of the deed in trust; the question therefore is, had *Groom* at the time of the levy and sale, or at the sale, such an interest as could be sold under that execution? If he had not, the defendant is a mere stranger, and however much to be regretted, appears in the character of an intermeddler, not though in the opprobrious meaning of that term—it appears that he has acted honestly. But if such be the case, that is, if the property was not subject to the execution, he cannot avail himself of the fraud practised by *Brown* and others—if it be fraud. I believe no where can be found a more lucid and satisfactory opinion upon the subject than the one given by Chief-Justice SPENCER, of New-York, in the case of *Bogert v. Perry & others*, 17 *Johnson*, 351,—to this therefore I refer. They have in New-York, as regards this point, a statute similar to ours of 1812, both, in substance, taken from the statute of *Charles*. It is evident, that independent of that statute, *Groom* had not such interest as could be sold under an execution at law; he had nothing but a mere equity, at most a mixed trust, or a chose in action, neither of which an execution at law could affect. Our act provides, that it may be lawful for the sheriff, or other officer to whom a writ shall be directed, at the suit of any person upon a judgment then had, or hereafter to be had, to so make and return execution to the party suing, of all the goods, lands, &c., as any other person shall be possessed or seised in trust of, for the person against whom the execution issued, and that said lands and goods shall be held by the purchaser at execution sale, free from and discharged of the title and incumbrances of the trustee. These are not the words, but is the substance of the act. If there had been a doubt upon reading the first part of the statute, whether a mixed trust such as this could be sold, where part is held for one person and one purpose, and part for another person and another purpose. I think the doubt would

(347) have been removed by that branch of it which divests the seisin out of the trustee, and vests both his estate and the estate of the *cestui que trust* in the purchaser. It could not be designed by the legislature to word this wrong, and it will not be attributed to them, when there are proper subjects on which the act can operate, and coming more within its bounds—a person seised or possessed in trust for another, not one seised in trust for one for one purpose, and to another for another purpose; where the formal and nominal title is in one in trust for another. By confining the statute to such cases, no injury is done, for the trustee had no other duties to perform than to permit the *cestui que trust* to enjoy the property. There is no possible way to reconcile the statute to any thing like common justice, but to say that the estates shall be apportioned, and all shall be taken out of the trustee, and with the trust estate vested in the purchaser, except what will enable the trustee to perform the trusts to others; in this case, it would leave an estate in the trustee of which I cannot well conceive. What is it? As much as will pay *Pierce*? What then is the nature of the estate which the purchaser has? He has *Groom's* right to the surplus, and the trustee's legal title to the property out of which this surplus is to be raised. If the trustee could find property which would bring the debt to *Pierce*, and no more, he might sell it, and then the balance of the property in kind would belong to the purchaser at execution sale; sell as much as will pay *Pierce*, the balance is the purchaser's—the trustee has nothing to do with it, both legal and equitable title is in the purchaser. The purchaser might say to him, take your pound of flesh, but not one pennyweight more. How the purchaser at the trustee's sale stands, who purchased one article which overwent the debts of the remaining *cestui que trust*, I know not; as to the amount of the debt the sale was good, and bad for the balance; for that power which he once had to sell, being dependent on his title, was taken from him—as to part of the article the purchaser would have a

(348) right to it, and none to the other. I cannot see the extent to which it may be carried. By such sales, speculation would be encouraged, but would be placed upon unequal grounds. One might have correct, and another incorrect information. I think that the legislature in-

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tended to leave such interest (entirely untouched by the act) to the jurisdiction of a Court of Equity, where the property itself would be sold, and the money divided according to the rights of the parties.

This is a hard case on the defendant; but I cannot see how he can prevail in this action.

By the Court,

Judgment affirmed.

Approved. Gillis v. McKay, 15 N. C., 173; *McKay v. Williams*, 21 N. C., 398; *Gowing v. Rich*, 23 N. C., 553; *Thompson v. Ford*, 29 N. C., 418.

STATE v. PATILLO & SAUNDERS.

From Lincoln.

Promissory notes are not public tokens of themselves; bank notes are; an indictment, therefore, for a cheat at common law, by passing certain "promissory notes" as and for bank notes, without an averment that they resembled bank notes, cannot be sustained.

This was an indictment charging that the defendants, designing and intending to defraud one *Barnabas West* of a mare of the value of twenty dollars, "falsely, fraudulently, and unlawfully, did conspire, combine, confederate and agree among and between themselves, to obtain and get into their hands and possession, of and from the said *Barnabas West*, the mare aforesaid, under a false colour and pretence of paying to him, the said *Barnabas West*, then and there, forty-five dollars of good and lawful current bank notes;" and that the defendant *Patillo*, in pursuance of the conspiracy, afterwards did "falsely, fraudulently, unlawfully, and deceitfully, pass to the said *Barnabas West*, one promissory note of twenty dollars, two promissory notes of ten dollars, and one promissory note of five dollars, purporting each to have been made and signed by one *J. F. Randolph*; and purporting to (349) be made payable to the bearer;" and that *Patillo* and *Saunders* in pursuance of the conspiracy, did "fraudulently, and falsely pretend and affirm, to him, the said *Barnabas West*," that the said promissory notes were

good current bank notes; and that the defendants "by the false pretences aforesaid," fraudulently obtained possession of the mare; whereas, in truth and in fact, the notes were not good current bank notes, but on the contrary, were not worth one cent. The indictment concluded at common law. The jury found the defendants not guilty of a conspiracy; but that the defendant *Patillo* was guilty of a deceit, in manner and form as charged in the bill of indictment.

The defendant *Patillo* moved in arrest of judgment, because the indictment did not charge a deceit; and because the bills mentioned in the indictment did not constitute such a *false token* as would sustain an indictment for a deceit at common law.

The Court, DANIEL, Judge, overruled both objections, and passed sentence on the defendant, whereupon he appealed to this Court.

HENDERSON, Judge, delivered the opinion of the Court as follows:

Bank notes are public tokens, as much so as weights and measures, or the alnager's seal; it is not necessary that they should have a common law existence, to make the obtaining property, by means of mere counterfeits at least, at common law, any more than it is, that a chattel should have had a common law existence, to make it the object of trespass or larceny. It is sufficient that they have, no matter when, invented or discovered the qualities of a public token, *i. e.* calculated to inspire *public confidence*; in practice, they represent the coin of our country, and pass currently as money. Had this indictment, therefore, charged that the notes passed to the prosecutor, bore the likeness and similitude of our common bank notes, and that the defendant knew them to be worthless; I have (350) not a doubt but that the conviction could have been sustained, and it appears from the evidence, that such was the case; but it is to the indictment that we are to look, to see what the defendant has done; in that, it is stated that the notes passed by the defendant to the prosecutor, purported to be signed by one *Randolph*, and to be payable to bearer, and that they were worthless, without any averment or charge that they had any resemblance to

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bank notes. They are discovered, therefore, to be nothing more than common promissory notes, made by an individual promising to pay money to the bearer. We cannot view such notes as public tokens; these are not the kind of notes which pass with us as money. I repeat it, that had it been averred, and had the jury found, that they bore the resemblance of our common bank notes, and that the defendant knew that they were worthless, the offence would have been complete at common law. Whether it comes within our statute, it is not necessary to decide, the indictment is not framed upon it.

Judgment arrested.

STATE v. JOINER.

From Pitt.

Upon the construction of the 2d section of the act of 1818, *ch.* 985, *N. R.* against a mother for concealing the death of her bastard child; *Held*, by a majority of the Court, that the *corpus delicti* is concealing the death of a being upon whom the crime of murder could have been committed; therefore, if the child is *born* dead, no concealment is an offence against the statute.

It is not incumbent on the prosecution to show that the child was born alive, but the burden of showing the contrary, is on the accused.

This was an indictment against the defendant, a single woman, and contained three counts.

The first and second counts were for the murder of her bastard child, laying the death to have been accomplished (351) by different kinds of violence, and both concluding at common law; the third count was for a misdemeanor in concealing the birth of the child, and concluded against the form of the statute.*

* *Act of 1818, ch. 985, N. R. s. 2.*

Be it further enacted, That if any woman be delivered of issue of her body, male or female, which being born alive, would, by the laws of this state, be a bastard, and she endeavours privately, either by drowning or secret burying thereof, or any other way, either by herself or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed; in every such case the said mother so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five hundred dollars, and an imprisonment not exceeding twelve months.

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The prisoner was found not guilty on the first and second counts, but guilty on the third; and moved first, for a new trial, because the Court instructed the jury that upon the third count, it was not a material enquiry whether the child was born alive or not. This motion was overruled, and a motion was then made in arrest, for that the third count did not allege that the child was born alive, nor that it died.

The count was as follows, "that the said *Rinney Joiner*, on the twenty-seventh of November," &c., "being big with a certain male child, afterwards, to-wit, on the same day and year last aforesaid, at and in the county of Pittaforesaid, by the providence of God, did bring forth the said child of the body of her the said *Rinney Joiner*, alone and in secret, which said male child, if the same had been born alive, would by the laws of this state have been a bastard; and that the said *Rinney Joiner*, being moved by the instigation of the devil, afterwards, to wit, on the said twenty-seventh day of November, in the year," &c., "as soon as the said male child was born, with force and arms, at and in the county of Pittaforesaid, unlawfully, wickedly, and wilfully, did throw, put and place the said male child under and beneath a crib there situate; and the said male child did then and there, under and beneath (352) the crib aforesaid, unlawfully, wickedly and wilfully, hide, secrete, and conceal, she the said *Rinney Joiner*, in manner and form last aforesaid, endeavoring privately, so to conceal the death of the said male child, that it might not come to light whether the child were born alive or not, but be concealed, against the form of the statute," &c.

The Court, PAXTON, Judge, overruled the motion in arrest and pronounced sentence, and the prisoner appealed.

TAYLOR, C. J.—The statute of 21 *James*, 1, was passed on account of the difficulty of proving the child's being born alive, in the case of its murder by the mother; it therefore makes the concealment of its death, almost conclusive evidence of its being murdered by the mother. But the extreme severity of the law prevented it from being carried into full operation; and upon trials for that offence presumptive evidence was required that the child was born

alive, before the other presumption that it was killed by its parent was admitted to convict the prisoner. But even under that statute, presumptive evidence was admissible that the child was born dead; and if, from the view of the child, it were testified by one witness, by apparent probability, that it had not arrived at its *debitum partus tempus*, the case was considered as not being within that statute, on account of there being presumptive evidence that the child was born dead; but under such circumstances, it was left to the jury, upon the evidence, as at common law, to say whether the mother was guilty of the death.

This statute was repealed in this state by the act of 1818 which restored the common law in trials for the offence of murdering a bastard child.

But although the concealment of the death of the child was justly conceived by the legislature as insufficient to raise a presumption that the mother had murdered it, so as to be convicted of that crime, yet it was an offence calculated to destroy the proof by which the mother might have been convicted. The state shall not be called upon (353) to prove that the child was born alive, because the mother has suppressed the means by which such fact could be proved, and this, while it is an offence in itself, also raises a presumption against the mother that the child was born alive. The mother cannot be prosecuted for murder by reason of this concealment, and therefore she shall be prosecuted for a misdemeanor. It is therefore apparent to me, that the *corpus delicti* described in the act is concealing the death of a being upon which the crime of murder could have been committed. If, therefore, the mother can show that the child was born dead, the presumption raised against her by the concealment is destroyed. She has committed no misdemeanor, because the subject concealed was not a human being upon whom the crime of murder could have been committed. The act in using the word "delivered," could only contemplate the birth of a live child, and not that sort of delivery which takes place before a woman can, according to the rules of parturition, be delivered of a live child.

The legislature may be supposed to have addressed the woman thus: "We could convict you for the murder of this child; but to convict you it would be necessary to

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prove that the child was born alive. This you have put out of our power to prove, because you have concealed the death of the child; and in so doing, you have committed an offence against public justice, in suppressing the means of a prosecution for murder." But if the woman can show that the child was born dead, she has not impeded the course of justice, and ought not to be convicted. I therefore think, it was fairly and strictly within the province of the jury, to consider whether the child was born dead or alive. There ought to be a new trial.

HENDERSON, Judge.--The offence consists in concealing the death, so that it could not be known whether the child be born alive. The object is, to prevent the *destroying* such children, not the concealment of their *dead* (354) *bodies*; the prevention of the latter is resorted to, as a means to prevent the former. It is therefore not incumbent on the state to prove, that the child was born alive, the agency of the mother in concealing the death, *i. e.* the manner of the death, and thereby preventing punishment from falling on the person who deprived it of life, is the *corpus delicti*; but if it appears, either by the evidence on the part of the state, or that which may be introduced on the part of the mother, that the child was born dead, or came to its death by natural means, it destroys the *probability* of the crime which the legislature intended to prevent, having been committed. The Judge should therefore have informed the jury, that to make out the crime of misdemeanor, created by our act of 1818, it was not necessary to be *proven* that the child was born alive; but if, from the evidence, they were satisfied that the child was born dead, or that it came to its death by natural means, that they should acquit, under the act. As to the child's being killed in the womb by design, so that it came dead into the world, that is an offence different from the one created by the act. To give a contrary construction, would be disregarding the substance and catching at the shadow, sacrificing the end to the means. It would require the conviction of the mother, who had concealed the body of the dead child which she had prematurely (and without any fault of her in that particular) brought into the world in that imperfect state, which, upon

inspection, it was quite apparent could not sustain for a single moment animal life, as contradistinguished from *uterine*; a construction, I am sure, with due deference to those who differ with me, the legislature never contemplated to be given to the act.

I therefore think that there should be a new trial.

HALL, Judge, *dissentiente*.—The indictment states, that the defendant did bring forth the said child, &c., which if born alive would be a bastard, &c., and that she as soon as the said child was born, concealed it by placing (355) it under a crib. It is not stated whether the child was born alive or not, and the Judge charged the jury, that it was not a material enquiry whether the child was born alive or not.

It is alleged on behalf of the defendant, that the facts of which she has been found guilty, do not amount to an offence under the act of 1818, *ch.* 985, and that of course no judgment can be rendered against her.

The act declares, that if any woman be delivered of issue of her body, which being born alive, would be a bastard, &c., and endeavors privately, either by drowning or secret burying, or *by any other way*, &c., so to conceal the death thereof, as that it may not come to light whether it were born alive or not, but be concealed, in every such case, &c.

It is argued that before the death can be proved to be concealed, life must be proved expressly to have existed. It seems to me otherwise. The act does not mean by the term *death*, the *act of dying*, the transition *from life to death*; by *concealment of the death*, is meant *a concealment of the lifeless body*. Issue of the body, is itself proof irresistible that life accompanied and actuated it up to the stage of maturity in which we behold it a corpse; is proof that life existed, but has been taken away; in other words, it is proof of death, and concealment of the body, may be or may not be a concealment of the death.

If the fact was established that the issue was born alive, and was destroyed by concealment beneath the crib, &c., it would be a felony, and come within the proviso in the 4th section of the act. This act was made for the purpose of punishing women for concealing their issue, without im-

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puting to them the crime of murdering them. I think judgment ought to be pronounced for the state.

Judgment reversed.

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(356)

From Person.

Indictment against two for an affray in "mutually assaulting and fighting with each other." The defendants were found not guilty of an affray, but that the defendant A. was guilty of an assault and battery upon R., the other defendant. Judgment on the conviction for an assault and battery may be pronounced.

The defendants were indicted in the following words, "the jurors for the state upon their oath present, that *Thomas H. Allen*, and *William H. Royster*, all late of the county of Person aforesaid, with force and arms, at Person aforesaid, on the 4th day of April, A. D., 1825, to, with, and against each other, did fight, and make an affray, to the nuisance of the citizens, and against the peace and dignity of the state." The defendants pleaded not guilty, and the jury found that the defendants were not guilty of an affray; but that the defendant *Allen* was guilty of an assault and battery upon the defendant *Royster*; and that the defendant *Royster* was not guilty.

Allen moved in arrest of judgment, because this was an indictment for an affray, and one of the defendants being acquitted, the other could not be guilty of the charge; and because on an indictment for an affray, one could not be found guilty of an assault and battery on the other.

The Court, NORWOOD, Judge, overruled the reasons, and pronounced judgment against *Allen*, from which he appealed.

TAYLOR, C. J.—There is no precedent in this case to govern the decision; but I think, upon general principles, and the reason of the thing, that the conviction is right. An affray is the fighting of two or more persons in a public place, to the terror of the citizens. The very definition therefore, includes an assault and battery; and if it was proved to the jury, that two men fought together
(357) in a private place, and under such circumstances as that

it could not be a terror to the people, I think there is no doubt that they might be acquitted of the affray, and convicted of the assault and battery; for this they have committed, though without the aggravation of an affray. If both might be so convicted, why not one? Certainly not because one person is incapable of committing an affray; for there is one case at least where he may be singly indicted for it. 1 *Hawks P. C.* 63, S. 2, 4. Nor would it be necessary in such an indictment to specify the particular mode of the affray, for an aggravated assault by one person, is sometimes laid as an assault and affray. An affray being, therefore, an assault aggravated by the circumstances under which it is committed, would seem to fall within the general rule, that when an accusation includes an offence of inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less. 2 *Cump.*, 583. As upon an indictment for burglariously stealing, the prisoner may be convicted of the theft and acquitted of the nocturnal entry, and robbery may be softened into felonious theft, and many other similar cases.

The only exception to this rule, arises from the prisoner's having been indicted for a different offence, whereby he would be deprived of any advantage which he would otherwise be entitled to claim; so that the prosecutor shall not be permitted to oppress the defendant, by altering the mode of proceeding; thus, on an indictment for felony, a prisoner is deprived of several advantages which he would have on an indictment for a misdemeanor, and therefore he cannot be convicted of the latter, upon an indictment for the former. No reason of this kind exists wherefore the defendant might not be convicted of the assault. The specific difference between this offence and a riot is, that there must be three persons at least to commit the latter offence, and if two only, are found guilty, they must be discharged; yet even in that case, if the defendants had been charged with committing the riot with divers other disturbers of the peace, judgment would have been pronounced.

(358) 1 *Ld. Raymond*, 484. If A assault B, without provocation, in a public place, and a fight ensues, both would appear to be the aggressors to those who did not witness the beginning of the quarrel; but a jury, upon being informed of the origin of the strife, would, in most

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cases, think it unjust to subject B to the same punishment with A. I think the conviction proper.

The other Judges being of the same opinion,

Judgment affirmed.

Cited, St. v. Glenn, 119 N. C., 804.

IN EQUITY.

AUGUSTUS MOORE v. ISAAC MOORE.

From Hertford.

Contribution among co-sureties was originally founded on the maxim that "Equality is Equity" among those who stand in the same situation. This maxim can only be applied to those whose situations are equal; otherwise equality is not equity, and hence if one surety stipulate for a separate indemnity, the equality of situation between him and his co-surety ceases, and the maxim does not apply.

The indemnity taken by one surety can be reached by the other only in two cases, either when it was taken in *fraud*, or for the benefit of the other.

Hence, if one surety for his own benefit, *fairly* take an indemnity, he may use it until indemnified.

If a surplus remain in such case, the other sureties may have the benefit of it.

The bill set forth, that about the 14th day of August, 1815, the complainant and defendant, at the request of *James Jones*, now deceased, became his sureties on a bond which was then executed to one *John Coffield* for £950; that said *Jones*, at the same time, executed a bill of sale by which he conveyed unto the defendant five negro slaves, conditioned to be void, if the said *Jones* should well and truly pay said debt to *Coffield*, else to be in full (359) force. That *Coffield*, a short time before the filing of the bill, had sued the complainant and defendant on said bond and obtained judgment; that *James Jones* died utterly insolvent, having first made his will and authorized his executors to sell his property; that said executors were about to sell the aforesaid negro slaves which had been mortgaged as aforesaid, when the defendant set up his claim to them; but he afterwards permitted the

executors to sell said slaves, upon condition the executors would pay to the defendant the amount for which said negroes were mortgaged, or apply said amount in such manner as should be directed by the defendant; that the complainant had been compelled to pay one-half of the aforesaid judgment at law, with interest, and the defendant the other half, viz., \$1,016, on the 25th February, 1818; that the defendant hath received \$1,050 out of the proceeds of the sale of said negroes, and besides this, another sum arising from said sale, and sufficient to cover the other half of *Coffield's* debt (paid by the complainant) was applied by said executors, by direction of the defendant, to the payment of other debts due by the estate of said *Jones*, for which the defendant was responsible as surety, but for which said negroes were not bound in any manner. The bill then prays for relief, &c.

The defendant insisted in his answer, that the bill of sale executed to him for the negroes was intended for his sole benefit, for that *James Jones* being indebted to the complainant, went with complainant to *Coffield* to borrow the sum named in the bill; that *Coffield* refused it, unless the defendant would join in the bond for the repayment of the sum loaned; that *James Jones* applied to this defendant to join him in the bond, which the defendant refused to do, unless said *Jones* would give him some indemnity, when said *Jones* agreed to give the bill of sale aforesaid, and that the complainant knew nothing of this; that the complainant had previously signed said bond with said *Jones*, and without indemnity, and that said bill of sale was executed

entirely for the benefit of the defendant, and would (360) not have been taken at all by the complainant. He

further answered, that the negroes were sold by the executors of *Jones* though he forbade the sale, and claimed the negroes; that the executors contended that three negroes had been levied on by executions before the date of his bill of sale. The defendant admitted, the executors had paid him \$800, and agreed to pay him the balance that may be due him on account of the aforesaid suretyship; that the two negroes which were unencumbered by the lien of executions prior to the bill of sale, sold for \$1,050, and the executors refuse to pay more than that sum.

HENDERSON, Judge.—Contribution among co-securities, arises not from any contract between them, but from a principle of natural equity—that equality is equity among persons standing in the same situation. And this being now the established and well understood doctrine of a Court of Equity, it is sufficient to infer an understanding among them of mutual contribution; for men are presumed to act in reference to the laws governing the transaction. Hence it is, that a Court of Law never sustains jurisdiction in cases where one surety seeks contribution from the other; but this principle of Equity can only apply in cases where their situations are equal, for equality among persons whose situations are not equal, is not equity. If one surety stipulates for a separate indemnity, in this respect his situation is different from that of one who makes no such stipulation; and this indemnity is reached in favor of his co-security, upon the ground, either that it was intended for the benefit of all, or that the taking it was a fraud upon the others. In such case, Courts of Equity convert him into a trustee, not permitting him to allege his own turpitude or selfishness as a protection; for they enter into the agreement under a belief of perfect equality, trusting apparently to the same laws of indemnity, and to the united exertions of each other, to avoid harm severally; therefore, to (361) take an indemnity, is a fraud upon the rest, and more especially, as it lessens the ability of the principal to indemnify the others, and if taken without such secrecy, it is presumed to be designed for the benefit of all and an indemnity fairly obtained. And such indemnities may be fair, and which the surety has a right to use exclusively for his own benefit, while he is indemnified; if more than sufficient for that purpose, the excess should be communicated to the other sureties, first, because it gives to the creditor an equitable lien on such indemnity, and the creditor should cede, and in equity is supposed to cede, to a suffering surety, all his means and facilities in enforcing and securing payment; and secondly, from the intimate connection subsisting between them, as being engaged in one common league, we have only to appeal to our own bosoms to ascertain the benevolent feelings excited by such connection, and the dictates of benevolence become duties, when not prejudicial to ourselves; but in observing its dic-

tates, we are not bound to encounter hazard or trouble, and therefore, where this surplus lien is sacrificed to our good or safety in that transaction, the co-surety has no right to complain.

The facts of this case preclude all idea that the complainant entered into the engagement, under a false appearance of equality, and it affords as little evidence that it was designed also for his benefit, for he attested the instrument creating the lien. In truth, this appears to be a fair and explicit transaction. The complainant was willing to become *Jones's* security without a lien, and without the participation of the defendant. Such proffer was made before the defendant was called on. Application was then made to the defendant, not at the instance of the complainant, to aid him in encountering the risk, but the money could not be procured without an additional name on the paper; in this situation, the defendant stipulates for a lien, and this within the knowledge and presence of the complainants, who required none, and negatived all (362) idea that the defendant was acting for their joint benefit, by attesting the instrument creating the lien.

He has, therefore, no claim, either on the ground of fraud or intention, and the claim to the excess, I think, stands on an equally slender foundation. Had the defendant wantonly or capriciously discharged the excess of the lien, the complainant would have had cause of complaint. But if the defendant, for his own ease and convenience in the transaction, sacrificed it, he has none. All he can ask is, that he should have it, when it is not longer of any service to the defendant. Good faith as to this, is all that the equity requires. If, by sacrificing the excess, he more promptly, and with less trouble and risk, obtained an indemnity, who has a right to complain? On whose rights or labors has he trespassed? Not on the complainant's. But I do not view the transaction at the sale of the negroes, by any means as an abandonment; it may be so, but the Answer does not admit it. But, as I have said before, that is entirely immaterial. If he did so, it was for his accommodation, to avoid controversy, to make himself perfectly safe. In this he has violated no obligation, at least none which a Court of Justice recognizes.

The bill dismissed with costs.

PUGH v. MAER, MURFREE AND BURGES.

FRANCIS PUGH v. MAER, MURFREE AND BURGES.

From Franklin.

An injunction granted upon the payment of the money recovered at law, into the office of the master, will not be dissolved, simply because obtained more than four months after the rendition of the judgment at law. The object of the act of 1800 on the subject of obtaining injunctions was to prevent delay and hazard to creditors, and this is accomplished by the terms imposed.

The bill alleged that the complainant, in the spring of 1819, contracted with the defendant *Maer*, for the purchase of fish, without specifying the quantity, (363) though complainant was to take as many as said *Maer* would deliver at the following prices, to-wit: \$4 per barrel for trimmed herrings, \$6 for shad, and the same price for rock; that a few days afterwards, one *Minor*, the agent of *Maer*, called on the complainants, and presented an account, in which were charged 168 barrels of herrings, 77 barrels of shad, and 7 barrels of rock, which, at the prices aforesaid, amounted to \$1,176; that the complainant did then give his bond for said sum, payable to the defendant *Maer*, three months after the date thereof; that he did so at the request of said agent of *Maer* when the complainant did not know whether the fish had been delivered or not, for there were boats on the river in which possibly the fish might have been taken, and complainant therefore took it for granted that all was right; that the said bond was given on the 15th May, 1819, when in fact, the fish had not been delivered, and that a few days after, upon the application of complainant's agent, he was unable to obtain other or more fish than about 178 barrels of herrings, 20 barrels of shad and 4 barrels of rock, which, according to the prices agreed on as aforesaid amounted to \$856. The bill further alleged that said fish were shipped to Halifax, and consigned to Messrs. *J. & B. F. Halsey*, merchants, for sale; and upon examination of them by said gentlemen, it was found that at least *one third* were spoiled and rotten; that the complainant had never seen the defendant *Maer* since he ascertained this defect in the fish, though at an early opportunity, he informed him of the deficiency in quantity. The bill then

alleged, further, that *Maer* endorsed the bond to the defendant *W. H. Murfree*, after it fell due, to-wit, on the 1st October, 1819, and that said *Murfree* endorsed the same a few days afterwards, to-wit, 10th October, 1819, to the other defendant *Thomas Burges*; that *Burges* had sued the complainant in the County Court of Franklin county, and obtained judgment; that from this judgment, the complainant appealed to the Superior Court of said county, at the Fall Term, 1826, of said Court, and (364) prayed for an injunction against all of said judgment at law, except \$571 66, and prayed also for general relief.

The fiat for the injunction was made 15th March, 1821.

At Spring Term, 1821, the defendant *Burges* answered, that he was a purchaser and indorsee of said bond for valuable consideration, and asked the benefit of the provisions of the act of 1800, ch. 9, and therefore prayed that the injunction might be dissolved; at which time the injunction was dissolved with costs, and the bill continued over as an original, and an order made, that upon the payment of the whole judgment into the office of the Clerk and Master, the defendant *Burges* should not receive the same, until he had given bond with security to answer the final decree in this suit.

The defendant *Murfree* answered, that he was a purchaser and indorsee without notice; that after he received the bond, he asked payment of complainant by his agent, and said agent did not inform the defendant that complainant made any pretence at that time that the fish he received were unsound, though he did state that some of them had never been delivered. Defendant believed it was nothing more than an excuse, and therefore did not inform the defendant *Burges* of it, to whom he assigned the bond for valuable consideration on 10th October, 1819, or thereabouts.

The defendant *Maer* answered, and admitted that complainant bought fish which he had at a fishery on Roanoke; that the prices stated by complainant were those agreed on by them; that the complainant attended on the day when the fish were to be delivered, and stated that he had no boat ready, and desired a postponement of the delivery till the next day, or some day fixed on by the complainant.

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Such postponement was had till then, when one *Samuel Hussy* attended for the defendant and counted out 168 barrels of herrings, 77 barrels of shad, 42 barrels of rock, which amounted to \$1,176; that said *Hussy* stated to defendant, that he delivered said fish by request of (365) the complainant to the captain of the boat employed by the complainant, which boat's crew commenced taking the fish on board before *Hussy* left there; that he was not present, but believes the account of the fish as above rendered to him by *Hussy* was correct, and that the same was delivered to complainant or his agents as charged.

Defendant answered further, that he knew nothing personally of the quality of the fish, but that he was informed by his agent, and believes that they were good; that the complainant and he agreed that part of the barrels should be opened, and that by that means the quality should be ascertained, and that his agent *Hussy* informed him that he did so, and the fish were sound, and that those not opened were well filled with pickle, which he ascertained from the sound in moving the barrels to count them.

Defendant further answered, that he sent the account aforesaid to *Wm. R. Minor*, and asked him to take the bond of complainant, which he did for \$1,176, as aforesaid; that he assigned to the other defendant *Murfree*, for valuable consideration, and he could give him no notice of complainant's equity, for he had not then heard of it—and concludes with a prayer for costs, &c.

To these answers replications were taken, and the cause set for hearing, and transmitted to this Court for a final hearing.

From the depositions it appeared clearly, that a day or two after the date of the bond mentioned in the bill, the complainant had received 202 barrels of fish, and that a delivery was made of the whole quantity contracted for; but that the remaining 50 barrels were left by complainant's boat until the first of June, when complainant, by letter, directed them to be sent to Cedar Landing, and that it was done.

With respect to the fish being spoiled, there was evidence on both sides.

Badger & Haywood, for the defendants, contend- (366) ed, that the fact of the delivery of the fish being

made clear by the proofs, the only remaining ground of complaint in the bill was the bad quality of the fish, which even if true, furnishes to this Court no ground of jurisdiction, as the complainants had adequate relief at law for the fraud; and that more especially as respects the defendants, *Murfree* and *Burges*, who are indorsers without notice. They also argued on the facts, and contended, that though it was clearly shown that complainant had spoiled fish in the year 1819, there was no evidence to show they were the same which *Maer* delivered to him. On the contrary, the depositions taken by *Maer*, showed that the fish which he delivered to complainant were sound and well put up.

TAYLOR, C. J.—The complainant comes into this Court, seeking a reduction of the judgment at law, upon the two-fold ground, that the quantity of fish he contracted for was not delivered; and that, of the quantity delivered, a considerable part was so damaged as to be unfit for use, and totally unsaleable.

That the number of barrels stipulated for was delivered to the complainant, seems to be placed beyond all doubt by the depositions of *Hussy & Minor*, the agents of the defendants; and if after the former had counted them out and gave the complainant a control over them, and after *Minor* had, at the complainant's request, conveyed the sixty-nine barrels to Cedar Landing, the complainant declined receiving them, he alone must be responsible for the loss; for the defendant could do nothing more to make the delivery complete.

The question as to the unsoundness of the fish, is involved in some difficulty as to the facts. There can be little doubt, that many of the barrels received by *Halsey*, to sell on account of *Pugh*, was unmerchantable, and that of these, some were marked with black paint; but whether these were the identical barrels which were received (367) from *Maer*, does not appear, though those also were marked with black paint. But *Pugh* might have bought, and *Halsey* might have received, other barrels with a similar mark; or other barrels might have been put on board the boat in her passage up the river. I admit, that the probability is strong, that the fish which were

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spoiled, had been purchased by *Pugh* from *Maer*, but better evidence of the fact might have been adduced.

But then the question occurs, were the fish unsound when delivered to *Pugh's* agent; or did they become unsound afterwards, from causes which were in activity at the time of the delivery? For the same consequence will follow in both cases; or did both cause and effect begin their existence after their sale? *Halsey* says, that he opened several of the barrels in presence of the skipper, who was well satisfied with their soundness; and that he knew by the sound of the pickle in others that they were properly filled. *Minor* sent some of the same fish to Richmond, and retailed others in the neighborhood, and heard no complaint respecting either. The leakage of the cask, and the escape of the pickle, is well known to be the most frequent cause of such fish becoming spoiled, and this may have happened in the shipping and stowing.

On the other hand, it is stated by the clerk of *Halsey*, that many of the barrels were without pickle, and that he was under the necessity of filling them up, so that from the evidence now before the Court, I should be wholly at a loss to determine, whether the fish were unsound when delivered, or in the way of becoming so; or whether they became unsound afterwards. The only thing certain is, that *Pugh* sustained a loss from their unsoundness. But supposing that there was evidence of the unsoundness of the fish when sold, yet there is none of a warranty, or of a knowledge in the vendor that they were so, nor any allegation in the bill to that effect. This Court cannot any more than a Court of Law, allow for the deficiency in the value of an article sold, in a case where the maxim of *caveat emptor* applies.

Upon the motion to dismiss, on the ground of the (368) injunction being issued more than five months after the judgment, though an option on that point is not essential to the decision of the cause, as I think the bill ought to be dismissed for the reasons I have given, yet, as a case of practice, it may be usefully settled.

The act of 1800 was passed for the avowed object of preventing delay, and debtors from thus defeating the claims of their creditors. Now this is effectually obviated by granting an injunction upon the terms of paying the

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money into the office—for thus all risk of the debtor's insolvency, or that of his securities, is avoided—and the money is held to be paid according to the decree, without a moment's delay. To dismiss the bill, therefore, on this objection, where an injunction is granted under the same terms with this, would be to sacrifice the manifest spirit of the act to its literal construction. I cannot therefore believe, there is any weight in this objection.

By the Court,

Bill dismissed.

Approved. Smith v. McLeod, 38 N. C., 390.

CANNON v. JONES, adm'r of Nichols.

From Wake.

The plaintiff was security for one G. The defendant, the administrator of the creditor, obtained judgments at law against the principal and surety in a joint action. Plaintiff filed his bill to be relieved against the judgment, on the ground that he was discharged in equity by the laches of the holder. G. is not a competent witness to prove the truth of plaintiff's bill.

This was a bill filed by the complainant, as a surety to one *Glynn*, against the defendant, as the administrator of *George Nichols*, deceased, who was the obligee in the bond alleging, that a short time after the bond was due, the principal offered to pay and discharged the same to the obligee, who refused to accept it, and gave further (369) time to the principal to pay the bond, without the knowledge or assent of the complainant; that afterwards the principal again called on the obligee in his lifetime, and offered to pay a part of said bond, when *Nichols* stated and agreed with the principal, that he the said principal should not pay the said bond, but that the said *Nichols* might still keep it to harrass the complainant; and that on several other occasions the same language was held by the said *Nichols*; and on one occasion, the said *Nichols* promised said principal to surrender up said bond; that he has died without doing so; that *Glynn* has become insolvent; that the defendant has sued the complainant and principal at law, and prays an injunction and general relief.

CANNON v. JONES, ADMINISTRATOR.

The defendant, in his answer, denied any *personal* knowledge of the matter, and put the complainant to proof. The only evidence was the deposition of *Glynn*, the principal, who supported the allegations of the bill throughout.

The question presented was, whether the principal in the bond is a competent witness to prove the equity of the bill?

Haywood, for the complainant.

The Attorney-General, for defendant.

TAYLOR, C. J.—The complainant *Cannon*, was surety for *Glynn*, and in a note given to *Nichols*, whose administrator, *Jones*, instituted a suit upon the same, and effected a recovery. The complainant has satisfied the amount of the judgment, and enjoined it in the Master's office, to abide the event of a decree in this cause. He claims to be discharged by the negligence and forbearance of the payee during his life-time, and of his administrator since his death, who he alleges might have received the money from the principal. To establish the facts on which he founds his equity, he offers the evidence of *Glynn*, the principal, and the single question in the case relates to his competency.

It is a general rule, that persons who have an (370) immediate interest in the event, as being liable to the costs of action, are incompetent witnesses. Thus, bail may not give evidence for their principal, because they are immediately answerable in case of a verdict against the defendant. In an assumpsit for goods sold, the plaintiff having proved the sale of the goods to the defendant, and one J. S., who were partners in trade, it was held, that J. S. could not be a witness for the defendant, to prove that the goods were sold to himself, and that the defendant was not concerned in the purchase, except as his servant; for by discharging the defendant he benefits himself, as he would be liable to pay a share of the costs to be recovered by the plaintiff. *Peake, N. P.*, 174. Though *Glynn* is liable to the payment of this money either to *Jones* or *Cannon*, yet he is evidently interested to defeat *Jones's* action against *Cannon*, since in so doing he would be liable to *Jones* only in the costs of one suit; whereas if *Jones* recovered against *Cannon*, the latter may

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recover against *Glynn*, the costs which he has paid in the suit brought by *Jones*. There is consequently a certain benefit resulting to *Glynn*, if *Jones* fails in the suit, and a certain disadvantage if he succeeds.

This precise question came before the Supreme Court of the United States, and it determined that the principal obligor in a bond, is not a competent witness for the surety, in an action upon the bond; the principal being liable to the surety for costs, in case the judgment should be recovered against him. *Riddle v. Moss*, 7 *Cranch*, 206.

But the witness offered is under an additional disqualification, by our act of 1797, c. 487, which allows a surety, who has paid money for his principal, to recover the same by a citation and motion in a summary way, without resorting to an action. Upon these grounds, I think there is no doubt of *Glynn's* incompetence.

The other judges concurred.

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(371)

From Wake.

Where a cause stands more than two terms upon replications, and the usual order for commissions, it is regular to set it down for hearing; and where no steps are taken to prepare the cause for trial, the suit may be dismissed for want of prosecution; but the plaintiff may, if he please, have the cause set for hearing on bill and answer, or may have it heard; therefore, when the judge below refused both, and dismissed the bill without hearing, such dismissal was held to be erroneous.

Bill filed at April term, 1822, the object of which was to set aside a conveyance fraudulently obtained from complainant *Williams*. The last step taken in the cause appeared to have been at the Spring Term of 1823, when commissions to take testimony were ordered, and at the Fall Term of 1825, defendants moved to dismiss with costs for want of prosecution. Complainants resisted this motion, and prayed the Court either to hear the cause, or set it down for hearing, which the Court refused, and ordered it to be dismissed with costs; whereupon complainants appealed.

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HALL, Judge.—The rule, that the party should be prepared in two terms to set the cause for hearing, is a good one, it prevents delay, and where the parties have taken no steps to prepare for trial, the causes have been generally dismissed, because it would avail the party nothing either to have the cause heard, or set for trial in that unprepared state; but cases may happen where a defendant admits enough in his answer to entitle the complainant to a decree for something, although in other parts of his answer he may deny other allegations in the bill which it is incumbent in the complainant to establish by proof; however without procuring such proof, the complainant may wish to have the cause heard on bill and answer, or set for hearing upon bill and answer. This I think he is (372) entitled to have done; as it was not done, I think a writ of procedendo ought to issue; but the complainant will not, of course, be entitled to take testimony in the cause, he can only do it upon sufficient cause shown. And of this opinion were the other judges.

 BRUCE et al. v. CHILD et al.

From Orange.

When a bill is filed to surcharge and falsify an account stated nineteen years before, the delay must be well accounted for, to repel the presumption arising from this acquiescence. For this purpose, it is not enough that the mistake sought to be rectified was discovered within a few months previous to exhibiting the bill, but it should appear why the discovery was not sooner made.

The bill alleged a certain sum received by the defendant, larger than that charged in the stated account. The defendant, in her answer, stated that her faculties were impaired by age and infirmities, and after so great a length of time since the transaction (about forty years) she could not speak with certainty to the matters charged in the bill, and said, in answer to the particular error, that she *believed* the sum charged in the stated account to be the true one, and did "*expressly aver* that to be the sum she received from her attorney, J. N., and no other." The attorney, in his deposition, swore that he paid her the larger sum; *Held*, that the charge was sufficiently denied to bring the case within the rule, that a decree will not be made against a positive denial, on the unsupported testimony of a single witness.

This was a bill filed August 28, 1812, setting forth that the plaintiffs were heirs at law and distributees of *John*

M' Kerall, late of Norfolk, Va., who died intestate, January, 1776, possessed of, and entitled to, a very considerable personal estate; that immediately upon his death, the defendant, his widow, took possession of the personal estate, and on the 21st of October, 1784, took out letters of administration in Norfolk; that in 1785, the defendant intermarried with *Child*, who possessed himself of the estate of *M' Kerall*, and afterwards died, leaving the defendant his executrix.

That on or about the 1st of January, 1793, the (373) plaintiffs, children of *John M' Kerall* and *William*

M' Kerall, another of the children, who was made a defendant to the bill, and *Mrs. Child*, caused an account to be stated of the estate of *John M' Kerall*, whereby a balance of £2,057 67, was found to be due to the estate from *Mrs. Child*, and on the 31st of January, 1803, the plaintiffs received their shares under such settlement.

The bill then charged, that in the settlement were divers errors, which were particularized; the only one material in the cause was the following, that the executrix gave credit for the sum of £220 only, Virginia currency, as cash received by her from *John Niveson*, of Norfolk, when in truth, she received £301 3 5.

It was further stated in the bill, that the plaintiffs never discovered this error until six months before filing the bill; that letters of administration on the estate of *John M' Kerall*, within North-Carolina, had been granted to the plaintiffs, and that they had applied in vain to *Mrs. Child* to have the errors rectified.

The prayer of the bill was, that the defendant *Mrs. Child* might be decreed to rectify the settlement and account, and to supply and correct its errors and omissions, and pay to the plaintiffs what might be coming to them.

The account and settlement, which were made part of the bill, exhibited a balance due, as before stated, and contained also the following statement:

We, *Absalom Tatom* and *John Hogg*, at the desire and request of the widow and heirs of *John M' Kerall*, heretofore of Norfolk, in Virginia, deceased, viz.: *Mrs. Frances Child*, heretofore widow and administratrix of said *John M' Kerall*, deceased, but now widow of *Francis Child*, Esq., deceased, *Miss Frances M' Kerall*, daughter, and *John M' Kerall*, and *William M' Kerall*, sons of the said *John M' Kerall*, deceased (the said *William*, who is a minor, appearing and consenting hereto by his brother

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John, as is suggested by said *John*), having proceeded to state and settle the account of *Francis Child*, Esq., deceased, who intermarried with *Frances M'Kerall*, widow and administratrix of said *John M'Kerall*, deceased, for his, the said *Francis's* intromissions with the estate of said *John M'Kerall*, deceased, do, from the vouchers and statements handed to us by the parties, find the amount to stand as above stated, by (374) which it appears that the net amount of said estate in the hands of the executrix of the said *Francis Child*, deceased, on the 1st day of January, 1793, was, &c. [Then follows a statement of the gross amount, and the share of each.] In which account we have not included or taken into view, any charge the said *Frances* may have against the said children for boarding, clothing and schooling, previous to and during her intermarriage with the said *Francis Child*, Esq. The said parties having, in our presence, assented to and signified their approbation to this statement and settlement.

This was signed by Messrs. *Tatom & Hogg*, and bore date 13th of August, 1793.

A receipt for their shares, signed by plaintiffs, and dated 1st of January, 1803, followed.

Mrs. Child, by her answer (so far as it is here material) insisted on the great length of time which had elapsed since the accounts were settled by referees chosen by all parties; and as to the error in the sum received from *Nevison*, she stated that *Nevison* was her agent and attorney to settle and collect an account due from one *Sheddon* in Norfolk; that *Sheddon* had an account against her husband *M'Kerall*, and that on the adjustment of these accounts by *Mr. Nevison*, the balance due her husband's estate, as she believed, was £220, for which she had once accounted to plaintiffs, and she expressly averred that, and no other, to be the sum received by her from *Mr. Nevison*.

As to the discovery of errors in the account by plaintiffs, but six months before the bill was filed, she denied it.

At March Term, 1824, of Orange Court of Equity, on motion of complainant's solicitor, the cause was referred to the clerk & master of that Court to take the account, and report to the next term of the Court. At the following term, the clerk & master reported, that *Mrs. Child* had fully accounted for the estate of *John M'Kerall*, except as to the sum of £81 3 6, Virginia currency, received from *John Nevison*, as appeared by his deposition, which was referred to, and which the master stated to be the *only proof*. No exceptions were filed below to the mas- (375) ter's report; but at the same term, the cause was removed to this Court, on the affidavit of *Mrs. Child*.

Mr. Nevison's deposition stated, that *Mrs. Child*, while the widow of *M'Kerall*, and residing in North-Carolina, placed in his hands as an attorney, a number of claims belonging to the estate of *M'Kerall*, on various persons residing in various places; that the length of time rendered it improper for him to speak positively.

That one of these claims was against *Sheddon*, and the deponent believed was received by him at different times, and from different persons; but the deponent could not recollect with certainty, nor could he resort to his books, as they had been sent away during the late war, and had not been brought back; that the *only* claim on which he ever received any thing for *Mrs. Child* was that against *Sheddon*.

The deposition further stated, that of the money thus received, the deponent "paid to *Mrs. Child* the sums stated as per a memorandum on an annexed commission, which memorandum was taken prior to his books being sent away, to enable the deponent to state the sums so paid, in a deposition then intended to be taken, at the request of *Mr. Bruce*, but which was prevented, he believes, by the interruption of the times." The sums were then stated in three items, and exceeded the sum with which *Mrs. Child* had been charged in the settlement by £81 3 6.

Deponent further stated, that he made no agreement for the amount of his compensation; he charged a commission of five per cent. on money received; for travelling on his client's business, not only the travelling expenses, but a compensation for the same; and for all other business, customary fees according to the service, and that he made several journeys on the business of *Mrs. Child*. That not long before the late war, the plaintiffs called on him and asked information relative to his transactions, as the agent and attorney of *Mrs. Child*, when he showed them his books and vouchers, and gave them a memorandum.

On the opening of the cause here, *Budger* for (376 complainants, said, that as no exceptions had been filed below to the report of the clerk and master, nothing remained for complainants to do, but to move for a confirmation of the report, and to take a decree accordingly; that the reference to the master was an interlocutory

decree, showing that this was a proper case to surcharge and falsify in, and the question could not be here debated.

Gaston, contra, contended, that this reference was not an interlocutory decree, and according to our practice, could not be considered as decisive of the question whether the account should be opened; the reference to the master was merely made on *motion* to expedite the cause; and of this opinion was the CHIEF-JUSTICE; but HALL and HENDERSON thought otherwise, and considered it necessary for defendant to proceed first to set aside this order of reference, before any other step could be taken in the cause; whereupon *Mr. Badger* said, to save time and trouble, he was content the cause should be considered as on a petition to set aside the interlocutory decree. And on the next day

Badger for complainants, argued as follows:

The bill seeks not to *open* or *unravel*, but to *surcharge and falsify* a stated account. When an account is opened both parties become actors, and proof must be offered by both; when leave is given to surcharge and falsify, the plaintiff must produce the proof of error in the particulars alleged, and the whole account stands as stated, unless very clear proof be offered of such error. Hence, the Courts discourage applications of the former kind after a great lapse of time, but receive favourably the latter.

Is the lapse of nineteen years, since the settlement, a bar? I say, neither that, nor any other time is properly a bar.

The subject matter of the account, is one of *trust* (377) *direct*, and is entirely without the operation of the statute of limitations. As no time was a bar to the plaintiff to have an account, so no time is a bar to him when he comes to correct the account. In regard to both, though the Court respects time, it creates no positive bar. Whatever the lapse of time may be, when *fraud* is charged and proved, the Court will open an account. *Vernon v. Vaudry* (2 *Atk.*, 119).

As *fraud* is the ground on which an account is opened, so *mistake* is the ground on which to surcharge and falsify: and the Court will always, upon the latter ground, permit plaintiffs to surcharge and falsify, where, if the former existed, it would open the account. *Chambers v. Golding*

(5 *Ves., jun.*, 834, S. C., 9, *Ves., jun.*, 264). *Brownell v. Brownell* (2 *Bro. Ch. R.*, 62).

The case of *Pitt v. Cholmondley* (2 *Ves., sen.*, 564), and that of *Toogood v. Swanston* (6 *Ves., jun.*, 484), illustrate the distinction between opening and surcharging, and show that though the former is reluctantly granted, save for fraud, the Court anxiously extends the latter, whenever specific errors are assigned and proved.

Hawks, in answer, insisted, that in Equity, considerations founded on lapse of time, had their origin in *public policy* alone; that before any statute of limitations was in existence, Equity respected time; and after statutes were passed regulating time in the Courts of Law, Equity, that there might be uniformity of decision on the subject, only said, that in analogous cases in Equity, the same length of time should be adopted, not as a bar *proprio jure*, but as evidence of acquiescence; the result of which was simply to circumscribe, what had been more a subject of discretion in the chancellor. *Smith v. Clay* (3 *Brown Ch. Rep.*, 639, *note. Eden's ed.*).

Expediency or policy, therefore, being the foundation of the rule in Equity, it would follow, that in *every case* where, from lapse of time, this expediency or policy applied, the

Court would be influenced by it according to circumstances; that it hence followed, that a bill to *surcharge and falsify* an account, was no more entitled to favour, than a bill to have an account taken after great length of time; and though it was true, that on the former, the contest was confined to particular items of the account, and the onus fell on the plaintiff to support his allegation of errors, yet it was clear that the defendant might controvert by proof such allegation; and the difficulty of proof was no less as to the items complained of, than it would be on the whole account, after great lapse of time. Here the time was 28 years, which would probably induce the Court to prevent the taking of an account had none ever been taken; witnesses were dead, vouchers lost, defendant's faculties impaired by age, her memory gone; and as had been well said, "it is *too* hard to force a man to keep his evidence by him forever." This proceeding then not being entitled to favour, how was it to be considered as respected time? The account is not impeached

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on the ground of *fraud*. Surely the plaintiffs must come, even to surcharge and falsify, within *reasonable* time. The time at law, for an action of account, is three years; plaintiffs come here to correct a mistake, if it be one, after 19 years. (2 *Eq. Ca. ab.*, 576.)

But the *onus* of proving the mistake is admitted to be on the plaintiff. He must prove it *clearly*. It is denied positively in the answer, and the *only* evidence is *Nevison's* deposition, which is far from being positive. The Court (if time be against us) will not decree against our positive answer, on the deposition of a single witness.

This was not the case of an *express trust*, administrators and executors are, in Equity, trustees by *implication* only. (1 *Maddocks*, 466.) But if defendant had been a trustee, the fiduciary relation between her and plaintiffs was destroyed upon the settlement by *Hogg & Tatom*, and she stood in a new relation, that of debtor.

Gaston, on the same side, took the following (379) grounds:

1. That the settlement by *Hogg & Tatom* must be considered an *award*, and as such was favoured in law; that it could not be set aside but on good grounds; it might be impeached for error, but this could be done only upon those errors being made manifest to the arbitrators; they must be convinced, and admit that they have committed an error. (1 *Ves., jun.*, 369, 370. 2 *Ves., jun.*, 14. 18 *Ves., jun.*, 447, 449.)

And whether the award was the result of a submission without rule of Court, or under a rule, it had the same validity, and stood on precisely the same grounds at law and in Equity. (*Kyd* 10, 276, 327, 329, 330, 331.) And here, there was no admission of error by arbitrators, no attempt made to obtain it, and no cause shown for not attempting it.

That if evidence short of the arbitrators' admissions would do, here there was no satisfactory evidence of any error; it rested on *one* witness, unsupported by any proof, and positively contradicted by defendant; which would not be sufficient if this were an *original* enquiry, even though witness should be *positive*.

2. That if the award be reviewed, plaintiffs had not come

in time. In the case of a bill of review, the time was fixed by analogy to that prescribed by the statute for writs of error; and here a writ of error must be brought within five years. Awards are protected by time at least, as effectually, as the judgments of tribunals, whose decrees may be reversed by a superior tribunal. *South-Sea Company v. Bumstead* (2 *Eq. Ca. ab.* 80, *pl.* 8. *Kyd* 362). It was true that the mistake was alleged to have been discovered only six months before bill filed; this should have been accompanied by an affidavit, according to the analogy of bills of review, for new matter discovered. (*Mitford* 66.) But the allegation was denied, and no reason was shown why plaintiffs could not make discovery sooner.

3. If the settlement by *Hogg & Tatom* was not (380) an award, but a stated account, it might indeed be corrected, if erroneous, and the party might be permitted to surcharge and falsify before the Master; but he must first prove to the satisfaction of the Chancellor that there was an error; when it was clearly shown, then, and not till then, was there a ground to surcharge and falsify. (5 *Vesey, jun.*, 835, 836. 9 *Ves.*, *jun.* 265. 2 *Ves.*, *sen.*, 566. 6 *Ves.*, *jun.*, 487.) But the enquiry here was not very material as the master had reported the evidence, and stated it to consist of one deposition.

4. But as an account, it was still open to the question of time. The fiduciary relation between the parties was dissolved by the settlement, and the plaintiffs had a new *legal* right and a corresponding remedy, which might have been enforced within *three* years; he should have come here within the same time. In England, the limitation in cases of this kind is six years. *Booth v. Warrington, Western v. Cartwright* (2 *Eq. Ca. ab.* 2 *part* 576), the latter case commented on in 2 *Scho. and Lef.*, 636.

Badger, in reply.—The report of *Hogg & Tatom* has not the character of an award; they were not chosen to settle a dispute, for none existed, but were auditors to take an account, which when taken, was the stated account of the parties, not the determination of arbitrators.

The case in 2 *Ves.*, 14, was an application to Equity to set aside an alleged mistake of a fact by an arbitrator who was to decide a disputed matter; and it was held that

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it could not be done, without the admission of the arbitrator that he had mistaken the fact, because he was absolute as to the facts and the legal consequences resulting therefrom. The same remark will apply to 18 *Ves.*, 447.

As to deficiency of proof, *Nevison's* testimony is *positive*, founded on entries made in his books in the course of his business, states the amount paid over after deduction of every charge; and defendant's denial is not positive, her answer begins with a declaration that her age is great, and memory imperfect, and every allegation or denial must be understood as being made with distrust and doubt.

As to the analogy supposed to be found in the case of a bill of review, there is no decision that an application to correct error in an award, must be made within the period prescribed for a bill of review; besides, there is an essential difference between an award and a decree; while both ascertain the amount, the latter only can compel its own execution.

The case of *Horeden v. Lord Annesley*, 2 *Scho. and Lef.*, cited on the other side, investigates that class of cases where conflicting claims in Equity exist. These are clearly distinguished from controversies between trustee and *cestui que trust*, in a case of direct trust. In the latter, time operates only as evidence, as a circumstance from which an inference of fact arises. This doctrine is well stated and illustrated in *Morse v. Royall* (12 *Ves.*, *jun.*, 374).

The Court will not examine the evidence to ascertain whether there be an error, before they refer it to the Master to take an account, with liberty to plaintiff to surcharge and falsify. (14 *Ves.*, *jun.*, 579.)

TAYLOR, C. J.—The object of this bill is to surcharge for an omission made in a settled account closed between the parties, something less than twenty years before the filing of the bill, and relative to transactions which date their existence about forty years before. In such a case, there ought to be clear and satisfactory evidence of the existence of the error, and I do not think that the deposition of *Nevison*, singly opposed to the answer, containing as strong a denial as the nature of the subject admits of, affords such evidence.

The Master's report is founded solely on that testimony,

as appears upon the face of it, and this warrants the application of the rule, that there cannot be a decree in (382) this Court, upon the testimony of a single witness, unsupported by circumstances, against the positive denial in an answer, which is responsive to the bill. Her answer is, that upon the adjustment of the accounts by *J. Nevison*, she does not believe that the balance found to be due was £336 13 4, the sum with which she is charged by the referees; "and she does expressly aver that to be the sum she received from her said attorney, *J. Nevison*, and no other."

I am also of opinion, that the complainants have not sufficiently accounted for the delay in not exhibiting this claim at an earlier period. The reason stated in the bill is unsatisfactory, that they did not know of it until six months before the filing of the bill. When the account was stated by the referees, at the instance of all parties concerned, it is fair to presume, that men of business would take the obvious and easy methods to become acquainted with their rights, that they might be prepared to exhibit just, and repeal unjust charges. *Mr Nevison* was known to be the attorney for the estate, and charged with the collection of debts due to it. When the account was stated, the administrators are charged with money paid by *Nevison*; and it was entirely in the power of the complainants to ascertain, within a reasonable period from the settlement, whether greater sums had been received from the attorney than the estate had been credited for. Long delay, in matters of account, places the accounting party under insuperable difficulties, especially where he is to be charged by memorandums of a third person. An earlier application might have revived the memory of circumstances serving to show that the credit has been rightly given. The very forbearance to make a demand, is considered as affording a consciousness that it was satisfied, or an intention to relinquish it.

"The Court will not aid stale demands, where the party has slept upon his right, and acquiesced for a great length of time; the activity of the Court can only be awakened by conscience, good faith, and reasonable diligence; (383) where these are wanting, the Court is passive and does nothing. Laches and neglect are always dis-

couraged; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this Court." 3 *Bro.*, 639. In one case it has been held, that if the party, upon a notice that nothing was due, did not investigate his own account, and never made any demand for the money, a demurrer should be allowed upon the statute of limitations. 19 *Vesey*, 188. That case was within the statute of limitations; but it held, that though the Court follows the law by analogy to the statute, it does not adopt it in all cases. It may be equitable to demand a debt, though not legal; but if be not equitable, the party will be left to law. After a great length of time without suit, it shall be presumed that the balance is satisfied. Though this is not a case affected by the legal limitation, yet it comes within the law of this Court, and presents a case wherein laches have made the demand inequitable. 5 *Vesey*, 678.

I am of opinion that the bill should be dismissed.

HALL, Judge.—*M' Kerall*, the first husband of the defendant, *Mrs. Child*, part of whose estate is now sought after, died about the year 1776; his residence was at Norfolk, in the State of Virginia. Early in the revolutionary war, his widow and children removed to Hillsborough, in this State. In the year 1793, when the parties were of full age, a settlement was made between them by two persons chosen for that purpose. In this settlement, *Mrs. Child* was debited with a certain sum of money received from *Nevison*, the witness, a resident of Norfolk. Nineteen years afterwards, the present bill was filed. The complainants allege, that *Mrs. Child* received a larger sum of money from *Nevison* than she was debited with in the settlement, and that they did not become acquainted with that fact until within six months before the suit was brought. They give us no reason, however, why they did not become acquainted with it. *Nevison* was as (384) easy of access then as afterwards; facts could have been established with more certainty then, than nineteen or more years afterwards. The mind and memory of *Mrs. Child*, who is now well stricken in years, was then much nearer their wonted vigour.

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For these reasons, I have but little hesitation in saying, that the bill ought to be dismissed with costs.

By the Court,

Bill dismissed with costs.

Approved. McDonald v. McLeod, 36 N. C., 221.

THE ATTORNEY-GENERAL and JOSEPH BELL and others,
inhabitants of the town of Tarborough, v. BLOUNT.

From Edgecomb.

Where a thing already exists which is alleged to be a nuisance, it may be a question whether this Court will interfere by injunction, before a trial at law establishing the fact of nuisance; but where the object of the bill is to *prevent* the erection of that which will be productive of injury, serious and irreparable, if erected, this Court will pass upon the question, and interpose its authority to avert the threatened injury, for the matter cannot be tried at law, and should this Court refuse its aid, there would be no remedy.

The complainants in their bill set forth, that the defendant intended to erect a mill and dam on a small stream in the vicinity of the town of Tarborough, and at a short distance from the public academy of that place; that a mill, now destroyed, had formerly been erected near the place at which it was understood defendant intended to build his, during the existence of which the health of the inhabitants of the town had materially suffered; and alleged, that if defendant should be permitted to carry his intention into execution, great and irreparable mischief would ensue, as the noxious vapours arising from the pond would materially affect the salubrity of the town, and tend to the entire destruction of the academy. In conclusion, it sought the preventive aid of the Court, and therefore prayed a (385) writ of injunction.

The answer admitted the intention charged in the bill to erect a dam and mill in the vicinity of the town, and at a short distance from the academy; but denied that the injurious consequences which were apprehended would be the necessary result of such erection.

Upon the coming in of the answer, a motion was made to dissolve the injunction. The Court refused the motion, but retained the injunction until hearing; and the cause

having been set for hearing, was removed into this Court, and it was now moved to dismiss the bill.

The case was argued at a former term by

Mordecai, in support of the motion. It is first necessary to ascertain what is the legal character of the apprehended mischief; in other words, if this mill and dam when erected would be a nuisance at all, would that nuisance be public or private? A private nuisance, is defined to be anything done to the hurt or annoyance of the lands, tenements or hereditaments of another. (3 *Blackstone's Com.*, 216.)

A public nuisance, is either the doing a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires. (4 *Blackstone*, 166.) This dam then, if erected, would, according to the complainants' allegation, be a public nuisance, an offence against the public order and economical regimen of the state. Who shall apply for the redress of a wrong? The public. The offence must be punished by indictment, at the instance of the state, for it is the state which is injured. As no particular individual is specially injured, no individual can recover damages. (3 *Blackstone*, 219.)

If the nuisance actually existed, these complainants could sustain no action, even if the mischief has come upon them; because for a *public wrong*, no *private action* will lie; *a fortiori* then they cannot sustain this proceeding to (386) avert the mischief. The case of *Dunn v. Stone* (2

Law Rep., 263), is express, that for an act in the nature of a public nuisance, no individual is entitled to an action, unless he has received an extraordinary and particular damage, not common to the rest of the citizens. The fears of mankind, though well founded, do not make that a nuisance which at law is not so. So determined by *Lord Hardwicke*, in the case of *Baines v. Baker* (*Ambler* 158; 2 *Atkyns*, 751). The case was one of an application to restrain, by injunction, the building of a hospital for inoculation. The injunction was refused, and it was then held, that in cases of public nuisance, there should be an information by the Attorney-General on behalf of the public. (1 *Maddock's Chan.*, 128.) Now if this be a nuisance it must be *public*. But if the erection of this dam and mill be an offence, it is one *criminal* in its nature, and to re-

strain the commission of a *criminal* act, an injunction will not be granted. (1 *Maddocks*, 104.) And on authority of the *Attorney General v. Utica Insurance Company* (2 *Johns. Ch. Ca.*, 371), it may well be questioned whether this Court has any jurisdiction in cases of this kind.

Gaston, for complainants. —The case stated in the bill is that of *irreparable mischief*, peculiarly affecting the *complainants*, sought to be prevented by aid of this Court's prohibitory powers. As a remedy exists for every wrong, there must of necessity, be some tribunal in the land to which these complainants may resort for relief. *This Court* is the proper tribunal. In cases where irreparable mischief may be done, in cases of waste, or in a plain case of nuisance, an injunction will immediately be granted (2 *Maddocks*, 174). The prevention of mischief, which should be one of the principal objects of every system of jurisprudence, constitutes a very important branch of equitable jurisdiction. Bills *quia timet* proceed on this principle. So also do bills to prevent waste, to perpetuate testimony, to restrain the negotiation of bills of exchange or promissory notes obtained by fraud; in which last case as in plain cases of waste, &c., courts of equity will, on motion, grant an injunction immediately, on the bill being filed. (1 *Fonblanque*, 41, *in notis*.)

As to the objection, that the fears of mankind will not make a nuisance, however well founded they may be, the injury apprehended in this case is by no means imaginary; and an accurate examination of the authorities will show that all that is meant by the rule is, that fears, however reasonable, do not *create* or *make* that a nuisance which is not already declared to be such by law, but the apprehension of a *real* nuisance, is the best cause for a bill *quia timet*.

It has been expressly decided, that infecting the air of a populous neighborhood with noisome smells is a real nuisance (1 *Burrows*, 333); then surely the evil apprehended in this case, the poisoning it with pestilential vapours, is a nuisance also. In reply to the observation that this when completed will be, if a nuisance at all, *public*, and that therefore, *individuals* have no right to ask the preventive aid of this Court, it proceeds on the opinion that public

nuisances are punishable only at the instance of the state. The fact is, that the distinction will be found to exist between nuisances, which are private, such as are public, and such as are public and yet especially affect certain individuals; for the first class, the party injured alone can complain; for the second the state, for the third individuals as well as the state, for it would be the strangest of solecisms where individuals have a deep, peculiar and distinguishing *interest*, to deny them the opportunity of asking protection for it. In accordance with this opinion, we find that even at law, where a nuisance is public, yet those individuals affected by it, have a right to sue (5 *Reports*, 73, *Mosely v. Pragnell*, *Cro. Car.*, 510). We find also the same doctrine prevailing in the Court of Equity (*Corporation of London v. Bolt*, 5 *Ves., jun.*, 129).

The case of *the Attorney General v. the Utica Insurance Company*, 2 *Johns. Ch. Ca.*, 371, relied on by the defendant's counsel, confirms the same idea, for the Chancellor explicitly adverts to the fact, that in the case before him, no individuals are disturbed in the enjoyment of their private rights, and recognizes as the origin of this species of jurisdiction, by injunction, that head of mischief, or those mischievous consequences, which required a power to *prevent* as well as to remedy.

As to the cases from *Ambler & Atkyns*, cited by defendant's counsel, whether the reasoning there resorted to be correct or not, it is on a foundation not applicable in the case now before the Court.

So important is the exercise of this preventive power, that an injunction will be granted in urgent cases of nuisance, on mere *petition and affidavit*. (2 *Maddocks*, 174; *Corporation of London v. Bolt*, 5 *Ves., jun.*, 129.)

In the case of *Wingfield v. Crenshaw* (4 *Hen. & Mun.*, 474), the doctrines for which I have contended are admitted, and if they be not correct, this Court is deprived of one of the most important branches of its jurisdiction.

Searwell.—The grounds on which we have proceeded, in this motion to dismiss, are, that the apprehended injury stated in the bill, is of such nature, that these complainants are not the proper persons to seek redress; that the nuisance (admitting the erection of this mill and dam to be

one) is *public*, and if so, the proceeding should be by the Attorney-General, at the instance of *the public*; and further, that the *fears* of a community cannot frame a case justifying the extraordinary interference which is sought by this bill. The authorities which have been already cited in support of these grounds, it seems to me, are directly in point. But it is urged, that this is not the case of a nuisance *purely* public; that it affects in a peculiar manner the inhabitants of Tarborough. If, on this ground these complainants may sustain their bill, may not every individual in the state do the same, without regard (389) to the locality of his residence? The injury to the town of Tarborough, and to the state at large, is precisely the same in kind, and differs only in the measure. But that each individual injured by this public nuisance could not seek a remedy for it, has been decided in *Powell v. Stone* (4 N. C., 263). If they cannot sue, *after* damages have actually befallen them, they surely cannot sue to *prevent* damage. It is not questioned that this Court has the power to interfere by injunction in cases of irreparable mischief. The true rule is, that complainant must have sustained an injury, for which he has a remedy at law, but which cannot be repaired by *pecuniary compensation*—then a Court of Equity will interfere to prevent. If this idea of irreparable mischief be correct, then the case cited by complainant's counsel, from *Hen. & Munford*, is in favor of the defendant. The evil which it was sought there to prevent was likely to prove injurious to health—an injury certainly admitting of no pecuniary compensation—yet the Chancellor, while he distinctly admitted his power to prevent irreparable mischief, refused the injunction, on the ground that it was not a proper case for the interference of the Court. The case cited from 5 *Vesey, jun.*, will be found on examination, not applicable in the present case. It was probably the fact, that by a plan adopted by parliament for the improvement of the city, the property was vested in the corporation of London; and their application for an injunction was merely that of a landlord against his tenant. This idea is countenanced by the remark of *Lord Loughborough*, in the case: "I can only interfere as between landlord and tenant;" and by the observation of *Chancellor Kent* relative to the case, that it was "*a private suit by Bill.*" (2

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Johns. Ch. Ca., 383.) But the current of decisions is uniform to show, that Courts of Equity will not interfere by injunction to prevent, unless it is *obvious* to the Court, that a nuisance is about to be created. The opinion is advanced by Lord Hardwicke, in *Baines v. Baker* (*Ambler*, (390) 158). Accordingly, it is laid down (2 *Maddocks*, 174) that injunctions will be granted in "a plain case." The opinion is repeated by Lord Hardwicke, in the *Fishmongers Company v. the East India Company* (1 *Dickins*, 163). The same sentiment is adopted by Lord Eldon, in the *Attorney-General v. Nichols* (16 *Ves.*, *jun.*, 342), and in the *Attorney General v. Cleaver* (18 *Ves.*, *jun.*, 217). In the latter of these cases, which was an information at the relation of several inhabitants of Battersea and Chelsea against the defendants, as manufacturers of soap, praying an injunction against them, until an indictment then pending against them should be tried. Lord Eldon observes, that "what is a nuisance, with reference to carrying on a trade, is a question of *fact*, which it is not very easy to determine," and adds, "that he had frequently known verdicts, deciding manufactories to be no nuisance, by which it cannot be denied, the whole comfort of life is destroyed, and health may in some degree be affected." The injunction was refused, until the fact should be ascertained by the jury.

The case now before the Court, we believe, is not a *plain* case of nuisance. It does not necessarily follow, in the nature of things, that the evils dreaded will result from the erection of this mill. If they do, it will then be an injury to the public, and the public has its remedy through the mediums of the proper law officer of the state.

After argument, upon the suggestion of the Court, the *Attorney-General* was made a party complainant; *curia adv. vult.*

TAYLOR, C. J.—Two enquiries are presented by the argument in this case; the first relates to the power of the Court to interpose the preventive remedy of an injunction; the other, whether it is proper to exercise the power under the evidence and circumstances of this case.

It is manifest, that without some jurisdiction (391) competent to prevent a threatened evil of the sort

complained of, there would be a great defect of justice in this state, for when the injury if done, cannot be repaired in damages, it is essential to the protection of right, that this Court, whose process is alone adequate to the occasion, should interpose its summary remedy, to compel persons so to use their own property as not to injure that of others. It has accordingly been long settled as a principle of the Court, that in cases where irreparable mischief may be done, as of waste, or in a plain case of nuisance, an injunction will be immediately granted. Where there is a clear right to the enjoyment of the subject in question, and an injurious interruption of that right which in equity ought to be prevented, this Court will not withhold its aid; and this rule is abundantly established by the authorities, 1 *Vern.*, 120, 127, 275; 2 *Ves.*, 414; 2 *Atyins*, 391, and many others.

It appears to me, that the evidence in this case approaches as nearly to ascertain the certainty of the apprehended evil, if not prevented, as can be expected from the nature of the subject. There was formerly a mill pond nearly in the situation where the defendant proposes to establish his, and during the whole time of its being kept up, the whole community, particularly the younger part of it, were subject to destructive autumnal diseases. Soon after the mill was broke and the pond emptied, a visible improvement took place in the healthfulness of the place, children were raised to maturity, the population increased, and a seminary of learning erected within what was before the sphere of pestilential influence; of these facts it is impossible to doubt after reading the depositions. Is it not to be expected that the same causes, if put into operation, will produce the same effect? Nor is the probability of this lessened, by the proposed alteration in the site of the pond, its size, and the situation of the mill. The utmost allowance that can be made on this point is, that it may not render

the town quite so unhealthful; but if the Court sees, (392) that not merely in the fears of the inhabitants, but a moral certainty exists, that if this work is suffered to proceed, the health of this community will again be put in jeopardy, it is its bounden duty to interpose. Indeed it is impossible to shut our eyes to the fact, that in this climate, a collection of stagnant water in the neighborhood

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of a town, will render the inhabitants unhealthy; and however different theories may be pressed into the service of accounting for it, or plans proposed to mitigate the evil, the painful conviction forces itself upon us, that the effect invariably follows the cause, and no antidote is yet discovered.

Under this observation and experience, a Court might be satisfied with much less evidence than has been adduced in this case. I am of opinion that the injunction ought to be made perpetual.

HALL, Judge. —This is not a case where it is necessary to controvert the question whether this Court will interfere by injunction or not, before a trial at law is had, declaring that to be a nuisance or not, which in the bill is set forth to be one. No such question in this case can be tried at law, no nuisance exists—the object of the bill is to enjoin the defendant from creating one. And it does appear to me, that it is a proper case for this Court's interference.

The nuisance which it is apprehended will arise from the erection of the mill, does not appear to me to be a phantom, created by the fears of the witnesses, but a reality bottomed upon past experience. It is not likely that the effects of ponded water would be less deleterious now than formerly, the same causes produce the same effects. I think the injunction ought to be made perpetual, with costs.

HENDERSON, Judge, was of the same opinion, so the injunction was made perpetual.

CROOM, ex'or of Whitfield, *v.* HERRING et al., legatees of Whitfield.

(293) From Lenoir.

B. W. having several children, to the elder of whom he had made considerable advancements, made his will, and after devising and bequeathing real and personal estate to his wife and to his younger children, and confirming the advancements made to the elder, directed the residue of his estate, real and personal, to be sold, and the proceeds "to be divided among all his *heirs*, according to the statute of distributing of intestates' estates."

Held, the word "*heirs*," as here used, means heirs *quoad* the property, and not "children," "next of kin" or "heirs at law." By it is to be understood, those whom the law appoints to succeed bene-

ficially to the property in question. The whole of the property here is personal, for the land being directed to be sold, and the proceeds divided, is regarded in this Court as personalty. Therefore, the widow of the testator is entitled under that term—she being by law appointed to succeed to personal property as well as the children, all claiming under the same statute.

The surplus mentioned in this clause, is to be divided among those entitled, without any reference to the advancements, or property bequeathed by other clauses.

The bill which was filed 10th April, 1820, stated that *Bryan Whitfield* died, having made a will, of which the plaintiff was an executor, and the sole surviving executor of those who had qualified; that a difficulty had arisen in the construction of the will, whereby plaintiff was likely to be injured, by reason of conflicting claims, and therefore he prayed that the parties interested might be made to interplead with each other, and that for his protection, he might have the advice and instruction of the Court.

Bryan Whitfield had many children: to the elder of these, he had made considerable advancements, both of real and personal estate. By his will he also devised to each of his younger children (who had not been advanced) real estate, bank stock, and slaves—and he also devised to his wife real estate, and bequeathed to her a few (394) slaves and stock, provisions and farming utensils to the value of \$1,200; and he also devised and bequeathed to his elder children, the estate advanced to them.

The testator, besides the estate so particularly advanced, and bequeathed, was seised and possessed of real estate, bank stock, slaves and other personal property, to the value of \$80,000.

After the several devises and bequests to his wife and children above mentioned, there came the following clause:

“I leave all my estate not mentioned in this will, both real and personal, except negroes and bank stock, to be sold on twelve months’ credit, and the money arising from the sale thereof, and the debts due me, after discharging all my just debts, together with my negroes and bank stock, not disposed of by this will, I leave to be divided among all my heirs, agreeable to the statute of distributions of intestates’ estates.”

The widow dissented from the will, and dower in the real estate was allotted her, but no notice was taken by them of the personal estate.

Upon the clause above recited, various claims were set up. The widow claiming to be entitled as one of the

“heirs,” according to the statute; the younger children contending that the advancements, made during the testator’s life, should be brought into hotchpot, if the children advanced, claimed any part of the residuum; while the older children insisted, that the residuum should be distributed without reference to the advancements; or that the specific legacies, as well as advancements, should be taken into account.

The cause was removed to this Court by affidavit.

HENDERSON, Judge.—He on whom the law casts an inheritance on the death of the ancestor, is designated by the technical word *heir*. It could not originally be used to designate him on whom the law casts the goods or chattel property, for it cast them on no one, no person was appointed by law to succeed to the deceased ancestor; (395) on his death, they became *bona vacantia*, and were seized by the king on that account, and by him, as grand almoner, applied to pious uses, now considered superstitious, for the good of the soul of their former owner. Hence it is, that in the common law vocabulary, there could be found no technical word to designate such successor. After one was pointed out by the Statute of Distributions, the technical word used in regard to inheritances, would not answer for that purpose; for very frequently the persons are different, the rules of construction being very different from the canons of descent. The meaning of the word *heir*, therefore, retains its primitive and technical meaning, when standing alone, and unexplained by the context. But as words of every kind, technical as well as others, and particularly when used in last wills, are liable to be varied in their meaning, to meet the intention of those who use them, when shown in an authentic manner the word *heir* may mean some other person than him on whom the law casts the inheritance in a real estate; and the question is, whom does it mean, when used in a last will, in reference to personal property?

It is admitted by all, that it does not (unless under peculiar circumstances) mean the heir to real estate. By some it is said that it means children; by others, next of kin; and by others, all those who are called to succeed to personal estate by law (the statute of distributions). Those

who are in favor of the meaning first mentioned, "children," say, that this is its vulgar and common meaning, and as it cannot have its technical one, it must have this. I think that the premises are incorrect, and even if correct, that the conclusion does not follow; the word heirs, in common conversation, may and very often must be understood to mean children; but this arises, not from the word alone, but from the context, the manner and cause of speaking; for a person to say that another has got an heir, or that he has heirs, must unquestionably mean, if the speaker meant any thing, that he has a child or children; for, to (396) understand him as communicating something, and at the same time to use the word heir, in its extended sense, is next to impossible; for there is not a man in a hundred thousand born, without there being some one to succeed to his property, should he die instantly, particularly to personal property, where foreigners are not excluded. Most of us are born with innumerable heirs, if so understood, unless, therefore, we are speaking of some foreigner just come among us, and then in regard to real property, or some person whose family connection is unknown, or supposed to be unknown, to the person spoken to, children must be presumed to be meant by the speaker, by the word heirs; for we are not born with children—they are an after acquisition; all of us do not have them at any time. It would be an absurdity to suppose, that the speaker designed to communicate to another, to inform him that another had that which is common to every man in the community when, by not a very strained construction, a sensible and rational meaning can be attributed to the speaker. I think, therefore, that the word heirs, of itself, unaided by any thing else, does not mean children, in common or vulgar conversation; although in such conversation, it must be so understood, to give to the speaker a rational meaning, or any meaning at all. This arises from what may properly be called the context, the subject; and if the premises are right, I should think the conclusion wrong; for the word was certainly adopted from the law of inheritances, and thereby acquired an analogous meaning, which would, by such construction, be entirely lost. Others say, that it means *next of kin*, admitting the analogy, and contending that blood connection is an essential constituent in an heir.

It is admitted, that by the canons of descent in England, that one to succeed as heir, must be of the blood of the ancestor; but he is heir, not because he is of the blood, but because he is the successor of the estate of the dead man.

The law has prescribed blood as a qualification; but (397) the right to succeed, and not the reason wherefore, stamps him with the character of heir. The law prescribed the canon of descent, to point out the successor; the person who succeeds is heir, not because he succeeds by this or that rule, but because he *succeeds*. And at once to put the argument at rest, it may be asked, does the widow who succeeds to the estate of her deceased husband under the act of 1801, come to the estate by purchase, or descent? For she must come in by the one or the other of these two ways; there is no other. It is very clear that she does not come in by purchase; that is, by her own act she is perfectly passive; it is thrown upon her by law, as much as it is thrown upon the uncle, there being no issue, brothers or sisters, or their issue; that is, none whom the law prefers to him. If she does not come in by the purchase, it follows, that she comes in by descent. She is, therefore, in such case, the heir of the husband—yet she is not of his blood.

Mr. Blackstone, in his discussion of the question, whether the Lord, who comes in by escheat, comes in by descent or purchase, has caused some confusion on this subject. He could find no canon of descent which pointed to the lord as heir to his descent; the lord was passive, at least not active in the character of purchaser, *i. e.* acquirer, and there was evidently a vague notion floating in his mind that he is not heir, because not of the blood. At length he takes the middle course, the one most apt to be taken by those who are not sure which course is right, and says that he succeeds by a kind of *quasi* descent, a kind of caducary succession. The fact is, that he succeeded to the *estate* of his tenant by neither; for he succeeded to his *estate* not at all, for the *estate* of the tenant expired by his death without heirs capable of succeeding him. It expired by the terms of its own limitation; for it was to him and his heirs; when they failed, the *lands*, not the *estate*, reverted to the grantor, the lord of whom he held them. The lord took the *lands* again in virtue of that right of reverter, which in

law is called a seignory. He comes in, not under, (398) or representing the tenant, but above him, and by virtue of a different estate. Exclude the idea of blood, and it is matter of surprise how it could be doubted that the widow is not included in the word heir, when applied to personal property. Her claims to the succession are precisely the same with the next of kin; both unknown to the common law, and both given by the same statute. Why the word heirs, should be translated into next of kin cannot be accounted for, otherwise than by blending blood connection with heirship; and if the meaning either of children, or next of kin, is to be received, grandchildren, where there are children, will be excluded; for it is said that grandchildren cannot take under the description of children where there are children, nor under the description next of kin; for grandchildren are not *next*, whilst there are *nearer*, and in the statute the evil is guarded against in lineal accession, and in collateral, as far as brothers and sisters children; the Legislature being aware that the more remote of kin would be excluded by the nearer, under the description next of kin.

These afford insuperable reasons why the word heir should not be understood to mean either next of kin or children. If, therefore, it neither means next of kin, nor children, there can be no objection to give it a meaning analogous to what is the proper technical meaning of the words *mutatis mutandis*, *i. e.*, they whom the law has appointed to succeed to the personal estate of dead men, who make no appointment themselves; as in real estates in such cases, the heir who is appointed by law to succeed the dead man. By this definition, all those appointed to take under the statute of distributions, are embraced, the law speaks and designates the heirs. Unless this expression is tolerated and permitted to bear this meaning, we shall be totally unable to express the idea without using a phrase instead of a term; for I know of no other term which will convey the idea. Distributee is sometimes used, but scarcely ever without an apology for it; a term of our (399) own coinage, which is not to be found in Johnson's Dictionary, in Jacob's Law Dictionary, nor in any other that I know of. I do not recollect to have seen it, in any English work of note, or not of note. As far as I

have been able to ascertain, the English authorities warrant this construction: I am very well satisfied that they are not against it. *Sir William Grant* very lately said, he was not, in the case then under consideration, called on to decide it, but that his opinion was, heirs, when applied to personal property, meant heirs *quoad* the property, and he repeated the same thing in another case.

It is true that there is a case to be found in *Ambler* (who is said to be not very high authority), decided by the Master of the Rolls, *Sir Thomas Clarke*, where it is said, that heir means children; but the absurdity to which this led him, is its own refutation. He first said that heirs meant children, and as grandchildren where there were children, did not mean children, he excluded the grandchildren. He should have recollected that *nullum simile est idem*; when drawing from the likeness he had taken, he should now and then cast an eye on the original, and the truth is, all who thus translate will be carried into the same absurdity.

Many cases were cited. I will examine a few of the most prominent. In 1 *Ves.*, 84, the testator directed that certain personal property, after the death of his wife, to whom he had given the greater part of his estate (and possibly the whole) for life, should be equally divided among his *relations, according to the statute of distributions*. It was decided, that it was not intended by the testator, by the words relations, to include his wife; first, because the wife is not the relation of the husband—which means blood connexions—and I think properly, the husbands and wives of such, who are by marriage identified with each other; secondly, he had given a life estate in the greater part, and probably all of the same property, which incongruity raised a presumption that he did not intend to include her.

(400) It was farther said, that she was not brought in by the words *according to the statute of distributions*; that by such reference to the statute, he did not intend to point out who was to take, for that he had done before by the word relations; but only how they are to take. I express no opinion on the correctness of this latter part, for it does not affect this case, or this part of it. In 18 *Ves.*, 53, the words are *my next of kin, as if I had died intestate*. It was held, and very properly, that the widow was not intended by these words; the wife is not kin, *i. e.*, of kind

to her husband. That had been long settled, soon after the statute of *Henry VIII.*, relative to granting administrations. The words, as if I had died intestate, as said above, did not point to the persons who were to take, but to the manner, and they could not enlarge by mere implication, the known and definite meaning of the words *next of kin*. In the same book, *p. 49*, the words are *next of kin* or *personal representatives*. As it is the office and nature of a limited description, to control and limit a general one, the *general description, personal representatives, was controlled and limited by the more limited and restricted one next of kin*; at least that is the reason assigned. The case of *Vaux & Henderson*, decided in 1806, by *Sir William Grant*, to be found in *Jacobs & Walker*, 387, in a note, was not, as I conceive, upon the point; the question there, was not, what particular individuals composed the heirs, or more properly were comprised under the description; but which class was entitled. The question arose in *Coutts'* will, who had bequeathed to *Vaux* £200, and in case of his death before him, to *Vaux's* heirs; *Vaux* died before him, the contest was between those who answered the description at *Coutts'* death, and those who did so at *Vaux's* death. The reporter called them the next of kin, a phrase no doubt of his own, as the question who they were, did not arise; the contest was between classes, and not individuals, a term therefore was used different from the purpose, without any regard to the point, whether it embraced all, and (401) excluded all, and excluded none of those who contested the question. The words came nearer to it than any other words which he could well use; for, as was said before, there is no technical word, and he would dislike, as a lawyer, to use the word heirs, when speaking of personal property. It was quite natural for him to use the word which embraced the greatest number of individuals composing the class, although it might exclude some; for it did not interfere with the question the note was designed to illustrate. The case proves nothing; for aught that appears, the widow might have been named in each class, if she was named in one she was in the other. Her claim, except as to the quantum, possibly by there being more in one class than the other, was not affected by the question.

And as a confirmation that I am right in this view of

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the case, the decision was made by *Sir William Grant*, whose opinion I have before stated.

I must not pass over the case of *Whitehurst's heirs*, decided in the late Supreme Court, in which decision I participated, and which principle I think is at variance with the opinion here delivered. I have no hesitation in saying, that the decision was wrong. It was decided without argument and on the authority of a case in *Pere Williams*, which I confess I did not then understand.

Upon the whole, I am satisfied, that this testator meant by the words "*to be divided among all my heirs agreeable to the statute of distributions of Intestates' estates*," to call to the succession all those whom the law appoints to succeed to the personal estate of a dead man, in default of his having made an appointment himself; and that his widow, in this case, is one of them. Upon the point of bringing advancements into account, after much hesitation, I am of opinion, that the property passing under that clause in his will was not to be affected by any disposition which he had at any time made of any other property; that the statute of distributions was referred to, to designate who he meant by the word heirs, and to point out the manner of the division of that property.

I think that the widow has abandoned her claim to the \$1,200; it is land, it was given in lieu of the land, taking dower satisfies for all claims for land; she cannot have her full share of the land, and that which was intended to make her share a full one.

The Master of the Court will take an account of the personal estate, in default of the parties appointing some one to do it; and in either case, a report will be made to this Court.

The lands being directed to be sold, and converted into money, are considered in this Court as personal estate.

The costs to be paid out of the fund.

By the Court,

Decree accordingly.

Approved. *Stow v. Ward*, 12 N. C., 67; *Brown v. Brown*, 37 N. C., 309; *Radford v. Radford*, 41 N. C., 490; *Henry v. Henry*, 31 N. C., 278; *Freeman v. Knight*, 37 N. C., 72.

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BENZIEEN'S ex'ors *v.* LENOIR et al.

From Iredell,

And

GRIFFIN'S heirs *v.* GRIFFIN'S ex'ors.

From Johnston.

In the first of these cases, in the year 1814 (the case then being in the Court of Equity of Iredell), certain points were submitted to the Supreme Court, and a decree was made there, and entered in the Court below for the plaintiffs. A petition for rehearing was thereupon filed in the Court below, and a rehearing having been ordered, the cause was transmitted to this Court for hearing.

In the second of these cases a decree was directed by the Supreme Court, and entered in the Court below, and the decree having been enrolled, a bill of review was exhibited, and a decree thereupon pronounced in the Court below, from which an appeal was taken to this Court.

Here it was objected that the decrees complained of were decrees of this Court, or at least decrees directed by this Court to be made below, and that neither a petition to rehear, nor a bill to review, could be entertained by the Court below; But, *held*, by two Judges, that the decrees were decrees of the Court below, and as such, re-examinable by bill or petition below, whether they were pronounced by the Judge upon his own opinion, or upon conference with the other Judges.

The bill, in the first of these cases, was exhibited in the District Court of Salisbury, and afterwards upon the change of the judicial system in 1806, was removed to the Court of Equity of Iredell county. In the latter Court, certain points were made presenting the whole case, and were transmitted to the Supreme Court, under the act of 1799, *ch.* 520, *N. R.*, for an opinion thereon. In Supreme Court, at July Term, 1814, a decree was made for the plaintiffs, directing the lands mentioned in the bill to be conveyed to them, and the possession to be surrendered; and further directing an account of the mesne profits to be taken and to be returned to the Court of Equity of Iredell.

This decree was entered in the Supreme Court, and according to the direction of the act of Assembly re-(404) ferred to, was also entered in the Court below, to be there carried into execution. Afterwards a petition for rehearing was filed in that Court, a rehearing ordered,

and the cause transmitted, under the act of 1818, to this Court for rehearing.

In the second of the cases, the bill was exhibited in the Court of Equity of Johnston, and ordered to the Supreme Court under its former organization. It was heard by the present Supreme Court, at a former term, and a decree pronounced for the defendants, and the bill dismissed. The decree was entered in the Court below, according to the act referred to; and the decree having been enrolled in the Court below, a bill of review was filed in the Court below, and ordered to this Court for hearing.

In this Court, a motion was made to dismiss the petition for rehearing, and the bill of review, upon the ground that the decree ought to be reheard and reviewed, were decrees of the Supreme Court, or decrees directed by that Court, and that therefore the Courts below could not entertain an application to revise or reverse them.

The question was elaborately argued; in the first case, by *Gaston & Seawell*, in support of the motion, and *Badger* contra: and in the latter case, by *Gaston*, in support of the motion, and *Seawell & Badger*, contra.

HALL, Judge.—Whether there should be a rehearing in the case of *Benzien's heirs v. Lenoir, &c.*, or whether a bill of review will lie in the case of *Griffin's heirs v. Griffin's ex'rs*, depends upon the right construction of the acts of Assembly passed for the purpose of establishing the Court of Conference, afterwards styled the Supreme Court.

The first act that passed upon the subject, was in the year 1799, entitled an act directing the Judges of the Superior Courts to meet together, to settle questions of Law and Equity, arising on the Circuit (*New Rev. ch.* (405) 520). This act, in the preamble, amongst other things, complains of the want of uniform decisions in questions of Law and Equity arising on the Circuits. It then proceeds to enact, that the Judges shall meet together at times therein fixed upon, in the city of Raleigh, for the purpose of determining all questions of Law and Equity arising and remaining undetermined upon the Circuit. It there puts it in the power of a single Judge on the Circuit, to adjourn questions of Law arising on the Circuit, to the

city of Raleigh, to be decided on by all the Judges at their stated meetings.

It is then made the duty of the Clerk of the Court of Conference, to transmit a full and correct certificate of the decision of the Judges, to the Clerk of the Superior Court of Law and Equity, where the question had been depending and had arisen, and the Clerk of said Court shall issue execution as shall be proper in the case, or otherwise proceed as the decision of the Judges may demand.

The reasons why there was a want of uniformity in judicial decisions, was that the different Superior Courts were held by single Judges, and there was no Court established of higher grade, for the purpose of making these decisions uniform, and as might be expected, there were, on the same question, contrariant opinions. This mischief gave rise to the act I have just recited. This act did not establish a Court of higher grade than the Superior Courts—it did not establish a Court of Appeals, to which an appeal lay from the Superior Courts, and in which, after an appeal, the suit was finally decided and settled: but it adopted the mode of making all the Judges decide every disputed question which arose in any of the Superior Courts which the Judge holding such Court thought proper to adjourn to the Court of Conference.

After the Judges in that Court gave their opinions, those opinions were certified to the Court from whence the case came, and the same proceedings were had on it, as if the Judges who held the Court had decided it (406) alone, and had not adjourned it to the Court of Conference, for the opinion of all the Judges. The record between the parties was complete in the Superior Court.

It is to be kept in view, that it was not necessary that the whole record should be taken to the Court of Conference, it was only necessary to transmit as much of it as set forth the questions adjourned there; after that question was decided, the decision was certified to the Superior Court from whence it came, as before observed. The record sent to the Court of Conference, remained there; but it was a dead letter, the Court could proceed no further upon it, and all further proceedings carried on in the Superior Court, and I think, without doubt, that the judgment between the parties was in the Superior Court.

Suppose two questions of law to arise in the Superior Court, and one only to be transferred to the Court of Conference, decided upon and certified back, the other to be decided by the Judge alone who held the Court, there could be but one judgment in such suit, and that judgment surely would be in the Superior Court.

The act of 1810, *New Rev. ch. 785*, authorizes an *appeal* from any decision made in the Superior Court to the Court of Conference (now styled the Supreme Court), and by another act, it is declared that no Judge shall give an opinion in the Supreme Court from whose opinion an appeal may have been granted; but it is obvious that the regulations do not affect the present question, because the case now before the Court was brought here by adjournment, under the act 1799, and not by way of appeal, so that all the Judges were at liberty to take part in deciding them.

The act of 1818, *New Rev. ch. 962*, constituting the present Supreme Court, declares that all causes pending in the then existing Supreme Court at that time, shall be decided by the Judges appointed by said act, and shall have, in every respect, the same effect and operation, and shall be certified and carried into effect, in the same manner, in all respects, as if made in the Supreme Court, under its present form. It therefore appears, that both the cases now under examination, are to be decided, as cases adjourned to the Court of Conference, under the act of 1799. I therefore think, that when the decrees were made in those cases, and certified to the Superior Courts respectively, those decisions or decrees were decisions or decrees of the Superior Courts. These cases were adjourned to the Supreme Court, to make all the Judges party to them, in order thereby to make the decisions in the State uniform.

If I am right in this view of the case, it follows that a rehearing may be had in one of them, and that a bill may be brought to review the other. Many authorities have been read in this case, which no doubt were very applicable to the organization of the Courts in England, but which did not apply in this case; because our Courts are far from being similarly constituted with the Courts in that country.

HENDERSON, Judge.—These cases depend, I think, on the question, whether the decrees sought to be reheard and reviewed, are the judgments of the Courts wherein the petition to rehear and the bill to review them, are filed, or the judgments or decrees of a superior and controlling Court. This question depends on the construction of our act of 1799, directing the Judges to meet at Raleigh, for the purpose of determining all questions of Law and Equity arising and remaining undetermined on the Circuit. The 3d section directs, that whenever any question of Law or Equity shall arise upon the Circuit, before any of the Judges of the Superior Courts, which the Judge sitting may be unwilling to determine, *and shall be desirous of further consideration*, and a conference with the other Judges; or where such questions had already arisen on the Circuit, and had remained undecided, by reason of a disagreement of the Judges on the Circuit, in either case, the Clerk of the

District Court, under the direction of the Judge (408) then sitting, before whom such question shall arise or come, shall make out a transcript of the proceedings in the case, and deliver the same to the Judge, or the case shall be made out by the counsel, under the direction of the Judge, or by the Judge himself, as the nature of the case may require, which the Judge shall file at the meeting of the Judges, with their Clerk. By the 4th section, the Judges are directed to argue and determine such cases, and file their opinions in writing with their Clerk. The 5th section directs, that the Clerk of the meeting shall make out a full and correct certificate of the decision of the Judges, and forward it to the Clerk of the Superior Court of Law or Equity, where the question had been depending and had arisen; and the Clerk of the said Superior Court shall issue execution, or otherwise proceed, as the decision of the Judges may demand. I have not given the words of the act, except only such as may assist us in ascertaining the meaning of the Legislature, so far as affects the present question. I consider this meeting of the Judges under this act, and also under the act of 1810, when sitting on adjourned cases, as possessing not a single attribute or quality of a Court, further than to protect themselves from interruption, that they might discharge the functions conferred by law; they had no process by which parties were

brought before them, or by which they enforced their decrees; the causes in which the points arose remained in the Superior Courts, the points only were adjourned to the meeting, the judgments were enforced by process from the Superior Courts, on judgments of the Supreme Courts, entered in that Court—they are judgments of the same grade as the other judgments of the Court. In ascertaining what the law is, I would respect it as a higher evidence, as I would respect an opinion maturely formed, more than one hastily made up; as the opinion of six men, more than the opinion of one man. But in Judicial graduations, I should rank it only as the judgment of the Superior Court.

I think there is nothing in the argument, that upon (409) the certificate of the Clerk of the meeting of the Judges, the Clerk of the Superior Court issues execution *instantly*. This is to avoid delay; the judgment is entered *instantly* from the certificate, as coming from the Judicial power presiding in that Court; and it is as competent for the Legislature to provide that it should be transmitted by the mode pointed out in the act, as to await the arrival of the Judge, and then (the doubts being removed) to receive the judgment from the lips of the Judge. The Clerk issues an execution upon it as a record of that Court, and therein recites it as such. It is said, to permit the Judge to rehear, is to permit him to alter or change the decree, it thereby places him above the Conference Court. I think not, it only makes him equal to himself, and gives to him the power inherent in our Chancellors, to rehear and alter the interlocutory decrees of his own Court, and to review and to reverse its final decrees, nor can this be considered as a subterfuge, that it is obeying the opinion of all the Judges in form, and substituting his own opinion for their's; he obeys the will of the Legislature by causing the opinion of the Judges in Conference, to be entered as the judgment of the judicial power, which presides in that Court, and that judgment has all the qualities of a judgment of that Court, and none other, liable to be reheard and reviewed by the same Judicial power that made it. I am strongly impressed with the belief, that this is the only fair construction of the act; for it is not fairly to be presumed, that the Legislature intended to take from these judgments a quality incident to Chancery decisions—a

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quality of being revised somewhere; and if not by application to the Supreme Court, to what Court shall application be made? If to the Conference Court, the applicant would be informed that they have not, nor ever had, the record.—it never was before them; that they had only the points of the case brought before the Judicial body which presides in the Superior Courts, when not in Conference; (410) that the instructions of that body had been entered on the records of the Superior Courts; that they had not any record to alter or amend.

I have cited no authorities, for none can be found in the history of the English law; it bears no analogy to the decrees of the House of Peers, that has every attribute of a Court. It has the most compulsory process to bring parties before them, to-wit, an appeal which lies to them from the Court of Chancery, and there is no doubt but they might cause the decrees to be entered on their rolls, and enforce them by process of their own; but, as matter of convenience, their decrees are remitted to the Court from which the case came, and there enforced. But on the point of re-examining their decrees, I express no opinion; nor would I be understood as expressing any in cases of appeals to the late Supreme Court, or to cases determined by this Court.

I am therefore of opinion, that the motion to dismiss the bill of review, in the case of *Griffin's heirs & next of kin v. Griffin's executors or trustees*, and the petition to rehear the interlocutory decree in the case of *Benzien and others v. Lenoir and others*, be disallowed. I think they both stand on the same ground.

Distinguished, R. R. v. Swepson, 73 N. C., 316.

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From Orange.

In the Court below an order of publication as to J. C., an absent defendant—and afterwards an order setting the cause down for hearing and removing it to this Court. It did not appear from anything in the transcript that the publication had been made, or a *pro confesso* taken.

Held, that setting the cause for hearing was irregular. This Court can take cognizance of a cause removed, only after it is set for hearing below. An irregular order setting the cause down for hearing is equivalent to no order—therefore this Court cannot proceed.

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In this case one of the defendants was a non-resident, and in the Court below, an order of publication was (411) made, but it did not appear from the transcript filed in this Court that the publication had been made; nor was there any judgment *pro confesso* entered against the absent defendant—but the cause had been set for hearing below.

When the cause came on here to be heard, *Badger* of counsel, desired to know, if he might proceed in the hearing, upon the presumption that, as the cause was ordered to be heard, all the preceding steps necessary to make that order proper, had been taken. The Judges at first appeared to differ in opinion; but it was agreed if proof of the publication could now be shown, the judgment *pro confesso* might be entered *nunc per tunc*. The hearing was then postponed, to give time for the production of such proof; but at an after day, *Badger* informed the Court, that no such publication could be found in the Gazette, and prayed, if the Court should be of opinion that the cause could not be heard without such proof, that it might be remitted to the Court below for further proceedings.

HENDERSON, Judge.—Upon principle, the order for setting the cause for hearing, presupposes that the conditional order for taking the bill *pro confesso* as to *Jennett Colquhoun*, had been made absolute, for the former order could not regularly have been made without the latter, that is, the cause could not have been properly set for hearing without the defendants having answered, or been in contempt for not answering. And in ordinary cases, where the defendant is in Court, it should not be required to be shown expressly, that all proceedings have been regular. This regularity may be fairly inferred by showing an order or proceedings of the Court, which could not have been properly done without such previous proceedings. But it would be improper to draw such inference in cases where the defendant is not in Court, for its foundation in some measure fails; we should not give to the service by publication, all the consequences of personal notice, so far as regards (412) all the proceedings in the cause, it is sufficient if we give to it the direct effects prescribed by the Legislature. The management of the cause in such cases is en-

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tirely in the hands of the complainant, and we are aware that it is impossible, with the utmost vigilance of the Judge, to preserve to an absent defendant all his rights; it is sufficient to award to the plaintiff all his direct advantages, without conferring any on him by inference. I am, for these reasons, for considering the rules for taking the bill *pro confesso* as conditional, it never having been made absolute; if the complainant could show that he had made publication, he might have it made absolute *nunc pro tunc*. This Court having jurisdiction only in cases set for hearing in the Superior Court, and an irregular order to that effect being as no order, the cause must be remanded; it was never properly here.

TAYLOR, C. J., and HALL, concurred.

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From Iredell.

A purchase by an administrator enures solely to the benefit of the next of kin, and the slave purchased remains in the hands of the administrator after the sale upon the same trust as before. One marrying an administratrix is trustee of the intestate's property in the same manner as his wife was, especially if he have notice that it was the property of the intestate. The claim of the next of kin to distribution is not affected by the statute of limitations, being the case of a trust to which the statute has no application. In such case time is not a *bar*, but a circumstance from which a presumption may arise that the demand has been settled by payment or otherwise. A great lapse of time affords a strong presumption, but such presumption may be repelled by facts explanatory of the delay.

And though the Court will not encourage claims brought forward after a great efflux of time, but will presume against them, yet where the delay is satisfactorily explained and the presumption of satisfaction sufficiently removed, the equity of the claimant remains unaffected, and the Court will decree for him, notwithstanding the great lapse of time.

In regard to time, equity acts by analogy to statute law or to common law, and time has the same effect as at law in the analogous case.

(413) Where the statute applies, *time* is a positive bar, may be pleaded, or is the ground of demurrer, and the right can only be saved by the same exceptions as at law have that effect.

It seems that equities of redemption and constructive trusts are cases in which equity acts as analogy to the statute, and time should be a bar in itself, according to the recent decisions in England. But when the rule as to time was adopted in this State, in such cases, equity was supposed to act in analogy to the common law. Hence, the time adopted was twenty years, and hence, also, it was con-

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sidered as only affording a presumption of fact, and not as a positive bar. Though this notion was incorrect, and properly seven years is the period and should be a bar, in analogy to our statute of limitations, yet the notion has been so long adopted—is supported by such a train of decisions, and so much property depends upon it, that it is now too late to disturb it.

In cases of direct or pure trusts, time has no influence. The estate of the trustee is that which supports the trust, and without which it could not exist, and his possession operates for the benefit of the *cestui que trust*. The trustee cannot, by any act of his, make his estate and possession adverse to the *cestui que trust*. The trust owes its existence to agreement, and it requires the consent of the parties to destroy it. Therefore, if the trustee be guilty of wrongful conduct, he does not cease thereby to be a trustee, and of the same kind of trust as before such conduct—but it is at the election of the *cestui que trust* to consider the trust at an end (if he please) and treat the trustee as a wrong doer.

This cause having been retained, on a former motion to dismiss (*vide* 9 N. C., 490), now came on to be heard, when it appeared to be a bill filed in 1817, setting forth, that one *Gilbraith Falls* died intestate, in June, 1780, and that in 1781, administration on his estate was granted to his widow, who in 1784 intermarried with *Hugh Torrance*; that complainants were the children of *Gilbraith Falls*, and at the time of his death were infants; that some of them, the daughters, married in infancy, and were yet married women; that among other property which belonged to their deceased father, was a negro woman *Flora*, who came into the possession of *Hugh Torrance* upon his intermarriage with *Mrs. Falls*, and that *Flora* had become the mother of several children; that *Torrance* and his wife never (414) made any settlement of their accounts as administrator and administratrix of *Falls*, and in 1815 or 1816, they died, and letters of administration on the estate of *Hugh Torrance*, were granted to his son *James Torrance*, the defendant, who by virtue thereof, took into his possession *Flora* and her children.

The bill further stated, that for a number of years, complainants were ignorant of the situation of their father's estate, and further, that *Hugh Torrance* made repeated declarations that he did not intend to hold, nor did he claim *Flora* and her children as his property, but that they should be distributed among the children of *Gilbraith Falls*, whereby complainants became less anxious to press for an immediate decision.

The prayer of the bill was, that *James Torrance* might deliver up *Flora* and her children, and account for the value of their labour.

The answer of the defendant admitted that *Hugh Torrance* died, as stated in the bill, possessed of *Flora*, and also of her children; and stated that in November, 1781, the personal estate of *Gilbraith Falls* was exposed to public sale; that in the month of March, 1784, another sale was made by the administrator, at which, not only almost all the property sold at the sale of 1781 was again sold; but also sundry articles which had come to the hands of the administrator since 1781; that this second sale was made on account of the depreciation of the currency of the country in the years 1781, 1782 and 1783; that owing to the entire depreciation of the *continental money* before the year 1784, the value of the estate was greatly reduced, and *Hugh Torrance* applied to the purchasers at the first sale (who were mostly the next of kin, or near relations of *Gilbraith Falls*) to surrender their purchases and permit the property to be again sold, and many of them did so. That as to the negro *Flora*, she was the child of *Binah*, who belonged to the estate of *G. Falls*; that *Binah* was purchased at the sale in 1781 by *Mrs. Torrance*, then the widow of *G. Falls*, at

the price of £70 hard money, which was a fair price,
(415) that *Flora* was born *after* this purchase of *Binah*, but whether before or after the sale in 1784, defendant was ignorant; that *Binah* was sold at the second sale in 1784, and purchased by *Hugh Torrance*, and *Flora*, if then born, must have been an infant, and was probably sold with her mother; and defendants insisted, that if *Flora* was born before the second sale, she was born the property of *Hugh Torrance*, inasmuch as her mother *Binah*, belonged to him under the purchase of the widow at the first sale, and his subsequent intermarriage with her; and that *Hugh Torrance* was not bound in Law or Equity to expose *Flora* to sale for the benefit of the estate of *G. Falls*.

Defendants also stated that a settlement of the accounts of the estate of *G. Falls* had taken place, and complainants had given receipts for their distributive shares more than 18 years ago, and some as far back as 1785; and insisted that as the bill charged no fraud, and pointed out no specific errors, complainants ought not, after this lapse of time, to

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open the account, and they prayed all the benefit which Equity would give from lapse of time.

As to the coverture of some of the complainants, defendants insisted it was true of a few only, and their husbands were competent to take care of their rights, and had every opportunity of learning the situation of the girl *Flora*; and as to declarations made by *Hugh Torrance*, that he held *Flora* and her children in trust for complainants, defendants answered, that they did not admit, nor had they reason to believe such to be the fact, but rather the contrary.

Seawell & Badger; for complainants.

Gaston, for defendants.

For Defendants. — *Hugh Torrance*, from whose administrator these negroes are demanded, was not the administrator of *Gilbraith Falls*. His wife was, but *her* representatives are not before the Court. This is not therefore a case in which the execution of a trust is demanded (416) from an original, actual, express trustee, but one, in which a trust is to be raised by implication, a constructive trust to be established by reason of the circumstances under which possession was obtained. *Mrs. Torrance* held *Flora*, before marriage, as her own. Being originally a trustee, plaintiffs had a right to consider *her* as always a trustee; and if this claim had been brought against *her* or *her* representatives, it might be regarded as liable to the rule, that no time operates as a bar *proprio jure* (17 *Ves.*, 96 to 100).

Nor is this a case in which it is admitted that the trust remains open, entirely unexecuted, but one in which an execution of it has been made; but it is contended to have been erroneous, and is sought to be corrected. The defendants swear, that the estate has been settled, and the time elapsed furnishes a perfect conviction of it. It is not therefore a case like *Ryden v. Jones* (1 *Hawks*, 505), of “an open, unexecuted trust, in which it is not pretended that the price has ever been accounted for.”

If these complainants once had a right to demand these negroes specifically, have they *now* this right as against the representatives of *Hugh Torrance*?

There are four classes of cases in Equity on the subject of time.

1. A title may exist at law, and the effectual assertion of it there, be so obstructed, as to drive the claimant into Equity. In such case, the assertion of the claim in Equity must be made within the time prescribed for bringing an action at law. The change of forum shall not *prejudice* the defendant. Here the Court of Equity acts *in obedience* to the statute of limitations. (2 *Scho. & Lef.*, 630, 633.)

2. A title may exist in Equity, where none exists at Law, and where relief in a different mode is given in Equity. In such case, if the equitable title be not asserted within the time within which a legal title, of the same nature, ought to be sued on, to prevent the bar created by the statute, the Court of Equity, acting *by analogy* to (417) the statute, will not relieve (1 *Scho. & Lef.*, 429. 2 *Scho. & Lef.*, 636-7. 17 *Ves.*, 97-8).

3. Where there is no bar from the statute, either in Law or Equity, lapse of time alone, unexplained, raises a *presumption of satisfaction*, both in Law and Equity; *e. g.* twenty years on a bond, raises presumption of payment; so on a legacy, *Jones v. Turberville* (2 *Ves.*, *jun.*, 13; *Ibid.*, 280). As to the general grounds of such presumption, see 12 *Ves.*, 265-6, approved by the Supreme Court of U. S., in 6 *Wheat.*, 504, quoted 10 *Wheat.*, 177, 2 *Atk.*, 105.

4. But where there is no bar, and no presumption of payment, a Court of Equity sometimes refuses relief on grounds of *public policy*. 2 *Scho. & Lef.*, 630, 639—4 *Bro. Ch. Ca.*, 257—2 *Ves.*, *jun.*, 90, 92-3-4, *Ibid.*, 584.

The last three of these rules or classes embrace the present case. The possession of *Mrs. Torrance* and her husband was notoriously adverse, and there was no *new* cause of action founded on any acknowledgment of his. The presumption of *satisfaction* on the facts, is irresistible; some of the parties were present at the sale, no claim is made for thirty-six years, the accounts settled with auditors in 1793, and the property personal.

Again, it would be intolerable, after such acquiescence, to take from one family, and give to another, a *whole family* of slaves, raised from a child, *born* after the mother was bought, upon so vague an excuse for delay as is here offered. Who of complainants were infants, when did disabilities cease, when were new ones created? These are matters, which if relied on as furnishing exemptions, should

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be *shown* distinctly. Besides, by analogy to the law, exemption of *one* will not prevent a bar as against *all*, and certainly cannot relieve *all*. The plaintiffs must bring themselves within the time, or some established exception, or show some deliberate act reviving the old, or creating a new claim. *Gaston* then examined, and commented on the testimony offered to support the allegation of plaintiffs, that *Torrance*, by his declaration, lulled them into (418) security, and insisted that it was a course pregnant with danger, to rely on vague accounts given of what he had been heard to say, "that he intended to leave the property" to the complainants; "that he did not care about the property he obtained by his wife," &c.

TAYLOR, C. J.—Upon reading the evidence in this case, the general conclusion I have reached is, that *Flora* and her descendants, were, after his death, part of the personal estate of *Gilbraith Falls*, and as such, subject to distribution amongst the next of kin, not having been otherwise disposed of by the administrators, in the regular exercise of their prescribed legal duties. It is not shown at what period of time *Flora* was born, whether before or after the first sale; but from her not being named in the first account of sales returned, from her apparent age at the second sale, from the reason then assigned by the administratrix for not selling her, and from other circumstances appearing in the case, I feel warranted in the conclusion, that she was born between the two sales. But admitting that she was born before the first sale, and that *Binah*, her mother, and herself, were purchased by the widow, administratrix, that sale, as it respected *Flora*, was a nullity, and can enure only to the benefit of the distributees. Their right to the property was not divested by it.

The same consequence follows, if she was born after the first sale, and before the second. In either case, she should have been disposed of with the rest of the personals, and the administratrix omitting to make such disposition, must, in Equity, be considered as retaining the possession under the original trust. When the second sale took place, it is admitted by the answer, that *Hugh Torrance* was married to the widow, and that he possessed himself of *Flora*, who was then bound by the trust, of which *Torrance* had

notice, as further appears in the answer, for he applied to the purchasers at the first sale to surrender their (419) purchases for the purpose of a resale. He is therefore bound in Equity, with respect to *Flora* and her children, to the execution of the trust.

From this short view of the case, it results, that the complainants are entitled to a decree, unless relief is barred by the lapse of time. It is true, that a Court of Equity is unwilling to countenance stale demands; and is averse to an interference in behalf of persons who have slept upon their rights, even in cases where there is no bar interposed by the statute of limitations. They will in such cases, adopt the presumption founded on the efflux of time that the controversy has been settled by payment, or otherwise. Time is, in such cases, a circumstance affording a strong *prima facie* presumption, but liable to be repelled by other circumstances, explanatory of the delay.

There has been in this case, a very considerable lapse of time, which considered alone, would be much more than sufficient to bar many claims to which no act of limitations applies, and which at first view forms a great objection to the relief sought. But I cannot but think, that the peculiar circumstances of the case are of strength sufficient to destroy any presumption arising from the delay, and to enable the Court to do justice, without infringing any of its rules, or holding out encouragement to the spirit of wanton and dormant litigation. The property remains the same, with only the addition of an increase from the parent stock; it is completely identified, and has undergone no other change of possession than that from *Hugh Torrance* to his administrator. The state of the property seems to have been known to some of the witnesses, and most probably to the neighbourhood, so that no purchaser will be vexed by a disputed title. The complainants could only assert their right by a legal controversy with the man who had married their mother, and who, it may be reasonably inferred, from the character given of him by the witnesses, had treated them with parental affection. But if these ties were too feeble to restrain them, those of interest may be deemed sufficient, for he had said in repeated conversations with the (420) witnesses, that the property he acquired by his marriage should devolve upon the children of *Gilbraith*

Falls, who had made it; and it is not at all probable that those children were ignorant of such declarations. Under the influence of these combined motives, the distributees may be supposed to have abstained from the assertion of their rights, without taking into view the legal disabilities under which some of them continued. Against these circumstances, I cannot presume that their demands have been settled, or that they have unreasonably slept upon their rights; but am of opinion that the equity of the case is in their favour.

HENDERSON, Judge.—As regards time, Equity acts either in analogy to the statute law or common law, when to the former, the statute of limitations is introduced with all its rigors, time is a positive bar, it may be pleaded, it is cause for demurrer, nothing prevents its operation, but what will have the same effect at law; when it begins to run it continues so, notwithstanding supervenient disabilities, if all the complainants are not within its saving, all are without them.

Where it acts in analogy to the common law, time is no bar of itself, but it furnishes evidence of a fact which is a bar, payment or satisfaction, or possibly abandonment; the lapse of time itself, is not therefore pleaded as a bar, but the fact which may be inferred from it is, but it is an inference of fact, not of law, as under the statute; it is offered as evidence, and like all other evidence, may be rebutted; there is something like an exception, when the lapse of twenty years, without other circumstances, is relied on, from this alone, a presumption of payment is inferred; it is one of those cases mentioned by *Lord Erskine*, the mind forms no belief about it for want of data, yet it is an inference of fact, and the belief, if it deserves that name, may be repelled by evidence, either de hors or intrinsic, and a bill in such case, cannot be demurred to, for want

(421) of stating those circumstances by which it is repelled, for they are matters of evidence only, and the bill should contain the facts and not the evidence, the first class of cases embraces those suits in Equity where the matter of them may also be the subject of one of those actions at law, enumerated in the statute, and in England at this day also, all suits in Equity, where the subject of them is *analo-*

gous to the subject matter of any of such actions. An instance of cases of the first kind, is a bill for an account for the same thing, as would support an action of account at law, six years is a bar in such case, and may be pleaded as such; an equity of redemption, or an implied or rather a constructive trust, is an instance of the second kind, twenty years adverse possession in such cases is a statute bar, and may be pleaded as such. The equity of redemption and the constructive trusts, being analogous to legal estates, an entry into which is barred by an adverse possession for twenty years, a bill to redeem, after twenty years, such possession, without stating on its face that which would take the case out of the statute at law, is bad on demurrer; so all the late cases on the subject, and particularly the cases of *Beckford et al. v. Wade*, 17 Ves., 98, and *Walpole's heirs v. Clinton*. When we adopted our rules as to time, as regards equities of redemption and construction trusts, indeed as to all cases except in such where the subject of the bill might be the subject of one of those actions enumerated in the act, the rule was understood to be framed in analogy to the common law; it was thought both here and there, that the statute had nothing to do with it, time was therefore considered as a mere matter of evidence, a presumption of fact; it therefore did not vary with the change of time by the statute, from twenty to seven years as it would have done if it had been thought to have been formed in analogy to the statute of England—it was easy to make the change in the decisions, for the time remained

the same, to-wit, twenty years. We have adopted (422) the common law rule throughout. Twenty years of itself forms a presumption of payment, or satisfaction, as it does at law; but is here, as there, a mere inference of fact—time is the evidence, and the inference may be repelled here, as it is there. It cannot, I think, be denied, but that, upon principle, the late English decisions are right, and of course, that ours are wrong; but after an uniform train of decisions for more than a century, the principle has something like legislative sanction, we cannot make a change, too much property depends on it. We must therefore declare the rule to be, that less than twenty years will not bar an equity of redemption, or an implied trust; and that should a longer period elapse, it is but mat-

ter of evidence, and that the presumption arising from it may be repelled; but that twenty years of itself, without proofs either way, dehors or intrinsic, raises a presumption of payment, abandonment or satisfaction, imperative on courts and juries, as to equities of redemption of personal property, and implied trusts relating to the same, particularly as to slaves. I believe, but I am not positive, that the same rule has always prevailed. We can get nothing on the subject from English decisions, personal property not being the subject of mortgage. It is there called *pledging*, in regard to which they have very different rules from those applied to mortgages. Pure trusts are not subject to the operation of time; for the possession of the trustee, is the possession of the *cestui que trust*. It is that which supports and fortifies his estate, and which, in fact, cannot exist without it. An analogy to the law time forms no bar; for the cause of action does not accrue, unless the trustee thinks proper to consider that it has—for it is not in the power of such a trustee to put off his character at pleasure. It was by agreement that it was created, and it requires the consent of both parties to put an end to it; but the *cestui que trust* may, if he thinks proper, consider the trust as at an end upon any misconduct of the trustee; but the trustee cannot, by his act or declaration, shake off his character. I am therefore disposed to doubt the (423) correctness of some late opinions, that in such cases time begins to run from the time the trustee disavows his character, and that is made known to the *cestui que trust*; for I am persuaded, that he can no more, by his own act, put off his character, than a tenant can, during his time, put off his, and convert his occupation into an adverse possession. During the period allowed by law for the settlement of the estate, the administrator may be considered as holding the property on an express trust, and afterwards, perhaps, as to negro property, it would be doing him no injustice, to view him in the same character; for, by law, he cannot purchase them himself, nor can they be rightfully sold by him, but by an order of the Court, and then only for the payment of debts, where the perishable property is insufficient for that purpose, or for the purpose of making division among those entitled. But this case does not require that this question should be decided;

for the case is, I think, against him, upon the ground of his standing as a trustee by implication or construction, a situation more favorable for him.

It appears that at the second sale, for I pay no regard to the first, as far as purchases were made by the administratrix, that the girl *Flora* was not sold, she being claimed by *Mrs. Torrance*, upon some frivolous ground—that afterwards, when the settlement or statement was made by the commissioners, *Huggins* and *Davidson* (upon which settlement, *Torrance's* distribution among each of the distributees was made and at different periods of time), she was not brought into account, and had she been sold for the payment of debts, it is to be presumed it would have been then alleged by him, for the statement was made long after the death of *Falls*, and his marriage with the widow; all these facts show very clearly, I think, that she remains yet to be accounted for. It is a case where the next of kin do not barely show that he was once liable, and call on him to account, in which case, lapse of time would of itself afford presumption of satisfaction, but by these (424) proofs, render it next to impossible that he should have accounted. I lay no great stress upon *Torrance's* declarations that *Falls'* children should enjoy the fruits of their father's labors, further than to rebut the idea of abandonment, for it grew out of some conversation in the family relative to the claim (I presume) for those negroes, for it does not appear that they claimed any thing more; but it weighs nothing with me, as to *Torrance's* recognition of their right; for I think it was nothing more than a mere gratuitous promise, which the law does not recognize, but refers the obligation entirely to the will of the person who made it. An account therefore will be taken of the hire of the negroes and the expense of raising them, allowing all monies or other things expended for their support. The account may be taken by any one the parties may agree on to do it, otherwise by the Master of this Court.

Approved. *Nesbith v. Brown*, 16 N. C., 30; *Petty v. Norman*, *Ib.*, 191; *Benzein v. Lenoir*, *Ib.*, 225; *Robison v. Lewis*, 45 N. C., 58; *Glenn v. Kenbrough*, 58 N. C., 173; *Whedbee v. Whedbee*, *Ib.*, 392; *Grant v. Hughes*, 94 N. C., 231.

SELBY, ADMINISTRATOR, v. DIXON ET AL.

SELBY, adm'r, v. DIXON et. al.

From Hyde.

A was indebted to B and C; B obtained a judgment against A, and before execution issued, a negro, the only property of A, was sold by a constable under an execution, when C purchased him for \$396, whereof he paid the constable \$18, the amount of his execution, and by consent of A, retained the balance of his bid to satisfy the debt which A owed him, as far as it was sufficient for that purpose. A bill filed by B against A, C and the constable was dismissed. B had no lien on the negro either in law or equity.

The complainant, who was the administrator of one *Tooley*, stated, that as adm'r he had recovered a judgment against *Thomas Smith* and his wife *Ann*, for \$300 at May Term, 1822, of Hyde County Court; that he issued an execution thereon, which was returned "nothing to be found;" that before the execution issued, the defendant *Dixon*, who was a constable, levied an execution on a negro man the property of *Smith*, to satisfy an execution of \$8, and sold the negro at public sale, when the defendant *Havens*, purchased her for \$396; that *Havens*, paid the amount (425) of the execution \$8, and no more, and gave *Dixon* a bond to indemnify him, in case he should sustain damage for not exacting of *Havens* the whole amount of his bid; that *Havens* took the negro into his possession, and still owed for him \$388, or thereabouts; that *Smith* and wife owned no other property, and that complainant's debt would be lost unless the negro, or the balance due from *Havens* could be made liable. The bill further stated that *Dixon* was about to collect the balance from *Havens*, and to pay it over to *Smith* and wife, and charged *Dixon*, *Smith* and *Havens* with a conspiracy to defraud complainant.

The answers stated in substance (and the proofs sustained the answers) that *Havens* purchased fairly at execution sale; that he paid the amount of the execution which *Dixon* had, and that by agreement with *Smith*, who was largely indebted to him, he retained the residue of his bid above *Dixon's* execution, in part satisfaction of his claim against *Smith*.

Upon the hearing below, Judge NORWOOD dismissed the bill, whereupon complainant appealed.

HALL, Judge.—I concur in opinion with the Judge below that this bill should be dismissed; the complainant has no lien on the negro or his value, which is in the possession of the defendant *Havens*, either in Law or Equity. *Havens* became the purchaser when the negro was sold, for valuable consideration; after paying off the debt for which he was sold, he retained the balance of the money bid for the negro in his own hands, for a debt which *Smith* owed him, and this was done by the consent of *Smith*, he might have purchased of *Smith*, *bona fide*, without the intervention of a public sale, because at that time there was no lien on the slave in favor of the complainant.

I think *Dixon* should be allowed his costs, and that the other defendants jointly, should be allowed costs.

And of this opinion are the other Judges.

By the Court,

Judgment affirmed.

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ABATEMENT :

An action by the father for the seduction of his daughter abates by his death and cannot be revived by his executors. *McClure's ex'rs v. Miller*, 133.

ADMINISTRATORS :

Vide *Executors and Administrators*.

ADVANCEMENT :

Vide *Construction*, 2.

AMENDMENT :

Vide *Practice*, 1, 3.

ASSIGNMENT :

Vide *Chose in action*, 1.

ASSAULT AND BATTERY :

Vide *Indictment*, 1.

AFFRAY :

Vide *Indictment*, 1.

ALIEN :

Vide *Jury*, 1.

BAIL BOND :

1. A sheriff may, but he is not *bound to*, insist upon two sureties to a bail bond. If he take but one, and he is *insufficient*, the plaintiff may except ; but the bond with but one is good, either on *sci. fa.* or in an action of debt. *Arrenton v. Jordan*, 98.
2. An assignment of the bail bond by the sheriff to the plaintiff, is not required when the suit is in the County Court ; the 17th section of the act of 1777 is confined to the Superior Courts. *Ibid.*
3. In a *sci. fa.* against bail, it is not necessary to state the issuing and return of a *ca. sa.* against the principal, though the want of such *ca. sa.* would be a defence for the bail. *Ibid.*

BASTARD :

1. Upon the construction of the 2d section of the act of '1818, *ch.* 985, *N. R.*, against a mother for concealing the death of her bastard child ; *Held*, by a majority of the Court, that the *corpus delicti* is concealing the death of a being upon whom the crime of murder could have been committed ; therefore, if the child is *born dead*, no concealment is an offence against the statute. *State v. Joiner*, 350.

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2. It is not incumbent on the prosecution to show that the child was born alive, but the burden of showing the contrary, is on the accused. *Ibid.*

BILLS OF EXCHANGE AND PROMISSORY NOTES:

1. A note not assignable within the statute, cannot be declared on, the consideration must be stated and proved, the note can only be evidence to the jury. *Stamps v. Graves*, 102.
2. Where a note is made payable on a contingency, and the contingency is of such kind as shows no benefit to the one or injury to the other party, the note of itself is no evidence of a consideration, but proof of a consideration must be given independent of the note. *Ibid.*

BOUNDARY:

What are the termini or boundary of a deed, is matter of law; where these termini are, is matter of fact. The Court must determine the first, and to the jury it belongs to ascertain the second. Where there is a call for natural objects, and course and distance are also given, the former are the termini, and the latter merely pointers or guides to it; and, therefore, where the natural object called for is unique, or has properties peculiar to itself, course and distance are disregarded; but where there are several natural objects equally answering the description, course and distance may be examined to ascertain which is the true object; for in such case they do not control a natural boundary, but only serve to explain a latent ambiguity. *Doe dem. Tatem & Baxter v. Paine & Sawyer*, 64.

Vide *Evidence*, 6.

CHOSE IN ACTION:

A vendee or assignee cannot sue in his own name for property which the vendor or assignor, at the time of sale, could only recover by a suit. *Stedman v. Reddick*, 29.

CLERK:

Under the act of 1823 for the promotion of agriculture, the clerk proceeded against for not making a return, may make his excuse to the Judge of the Superior Court, and on the sufficiency of such excuse the Judge of the Superior Court will decide in his discretion. This Court will not revise the exercise of such discretionary power. *State v. Sanders*, 198.

CONSIDERATION:

Vide *Bills of Exchange* 1, 2, and *Contract*, 1.

CONSOLIDATION:

Vide *Practice*, 4.

CONSTABLE'S SURETIES:

If a Constable sue out a warrant, obtain judgment thereon, and receive the amount thereof from the Defendant, *without an execution*, and fail to pay over to the Plaintiff the amount received, the securities of the Constable are liable to the Plaintiff, notwithstanding he received the money without having an execution. *Governor use Holcomb v. Franklin & others*, 274.

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CONTRACT:

The compromise of a doubtful right is a sufficient foundation for an agreement. *Truitt v. Chaplin*, 178.

Vide *Evidence*, 7.

CONTRIBUTION:

1. Contribution among co-sureties was originally founded on the maxim that "Equality is Equity" among those who stand in the same situation. This maxim can only be applied to those whose situations are equal; otherwise equality is not equity, and hence if one surety stipulate for a separate indemnity, the equality of situation between him and his co-surety ceases, and the maxim does not apply. *Moore v. Moore*, 358.
2. The indemnity taken by one surety can be reached by the other only in two cases, either when it was taken in *fraud*, or for the benefit of the other. Hence, if one surety for his own benefit, *fairly* take an indemnity, he may use it until indemnified. If a surplus remain in such case, the other sureties may have the benefit of it. *Ibid.*

CONSTRUCTION:

1. B W having several children, to the elder of whom he had made considerable advancements, made his will, and after devising and bequeathing real and personal estate to his wife and to his younger children, and confirming the advancements made to the elder, directed the residue of his estate, real and personal, to be sold, and the proceeds "to be divided among all his *heirs*, according to the statute of distributing of intestates' estates." *Held*, the word "*heirs*," as here used, means heirs *quoad* the property, and not "children," "next of kin" or "heirs at law." By it is to be understood, those whom the law appoints to succeed beneficially to the property in question. The whole of the property here is personal, for the land being directed to be sold, and the proceeds divided, is regarded in this Court as personalty. Therefore, the widow of the testator is entitled under that term — she being by law appointed to succeed to personal property as well as the children, all claiming under the same statute. *Croom, ex'r, v. Herring et als.*, 393.
 2. The surplus mentioned in this clause, is to be divided among those entitled, without any reference to the advancements, or property bequeathed by other clauses. *Ibid.*
- Vide *Devise*, 1.

COVENANT:

Vide *Warranty*, 1.

DEVISE:

- A devises lands to J W and his wife during their lives, and to the longest liver of them, and also bequeaths to them certain slaves, &c., for their lives as aforesaid; and after their decease he gives said property, real and personal, unto the heirs of their bodies lawfully begotten, to be equally divided among them, to them and their heirs forever; J W and wife are tenants for life only, and the heirs of their bodies take an estate in fee in the lands in remainder as purchasers, the remainder is contingent, and on the decease of the surviving donee for life,

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vests in such persons as are heirs of the bodies of J W and wife; a child, therefore, of J W and wife, who dies in the lifetime of the surviving donee, had no estate in the lands. According to the intent of the testator, the personal property, on the decease of the surviving donee for life, goes over with the lands to the remainder men; the heirs of the body of J W and wife take an absolute property in the personalty on the decease of the surviving donee for life, and the executor or assignee of a child of J W and wife, dying before the wife, has no interest in the personalty. *Jarvis et al. v. Wyatt*, 227.

EJECTMENT:

Vide *Boundary*, 1.

EMANCIPATION:

A testator by will directed his slaves to be liberated whenever the laws of the state would tolerate it, and that until that time, the slaves should be divided among his wife and children according to the statutes of distribution: eight years after the probate of the will, and after the slaves had been delivered over to the wife and children in a course of distribution, the executor filed a petition to emancipate one of the slaves, and set forth meritorious services. *Held*, that as the testator had not given it in trust to the executor to see to the emancipation of the slaves at any indefinite period of time, and as they had been delivered over to the wife and children by the executor, the trust ceased in the executor, and he had no authority under the will to file the petition; and the facts all appearing on the face of the petition, it was dismissed. *Pride, ex'or, v. Pulliam*, 49.

EQUITY:

1. A father, by deed, gave a negro to his daughter, and provided in it, that if she should die without children the slave should return to his family. The deed was put into the father's possession to be recorded, and afterwards, before it was recorded, the daughter, by parol, relinquished all claim under the deed, and exonerated her father from all obligation to have it registered, and authorized him to destroy it. She afterwards married and died. Her husband filed this bill to set up the conveyance: *Held*, that after the daughter's voluntary renunciation, she would not have been entitled to the aid of the Court to set up the conveyance: and that the husband, succeeding to her rights, could claim nothing more than she could. *Fordham v. Miller's adm'r*, 219.
2. Independent of this objection, whether the Court would set up this conveyance for the husband's benefit, thus giving it a different operation from what the parties intended, *quere?* *Ib.*
3. Where a cause stands more than two terms upon replication, and the usual order for commissions, it is regular to set it down for hearing; and where no steps are taken to prepare the cause for trial, the suit may be dismissed for want of prosecution; but the plaintiff may, if he please, have the cause set for hearing on bill and answer, or may have it heard; therefore, when the judge below refused both, and dismissed the bill without hearing, such dismissal was held to be erroneous. *Holmes & Williams v. Williams*, 371.

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4. The bill alleged a certain sum received by the defendant, larger than that charged in the stated account. The defendant, in her answer, stated that her faculties were impaired by age and infirmities, and after so great a length of time since the transaction (about forty years) she could not speak with certainty to the matters charged in the bill, and said, in answer to the particular error, that she *believed* the sum charged in the stated account to be the true one, and did "*expressly aver* that to be the sum she received from her attorney, J. N., and no other." The attorney, in his deposition, swore that he paid her the larger sum; *Held*, that the charge was sufficiently denied to bring the case within the rule, that a decree will not be made against a positive denial, on the unsupported testimony of a single witness. *Bruce et al. v. Child et al.*, 372.
6. Where a thing already exists which is alleged to be a nuisance, it may be a question whether this Court will interfere by injunction, before a trial at law establishing the fact of nuisance; but where the object of the bill is to *prevent* the erection of that which will be productive of injury, serious and irreparable, if erected, this Court will pass upon the question, and interpose its authority to avert the threatened injury, for the matter cannot be tried at law, and should this Court refuse its aid, there would be no remedy. *Attorney General et al. v. Blount*, 284.
6. Where a decree was directed by the Supreme Court (the case being then in the Court below), and entered in the Court below, and the decree having been enrolled, a bill of review was exhibited, and a decree thereupon pronounced in the Court below, from which an appeal was taken to this Court. It being objected here that the decree complained of was a decree of this Court, or at least decrees directed by this Court to be made below, and that neither a petition to rehear, nor a bill to review, could be entertained by the Court below; *Held*, by two Judges, that the decrees were decrees of the Court below, and as such, examinable by bill or petition below, whether they were pronounced by the Judge upon his own opinion, or upon conference with the other Judges. *Griffin's heirs v. Griffin's ex'ors*, 403.
7. In the Court below an order of publication as to J. C., an absent defendant—and afterwards an order setting the cause down for hearing and removing it to this Court. It did not appear from anything in the transcript that the publication had been made, or a *pro confesso* taken. *Held*, that setting the cause for hearing was irregular. This Court can take cognizance of a cause removed, only after it is set for hearing below. An irregular order setting the cause down for hearing is equivalent to no order—therefore this Court cannot proceed. *Brachen v. Colquhoun et al.*, 410.

Vide *Execution*, 4.

ESTOPPEL:

The sovereign power cannot be estopped. Where the crown, in 1768, granted lands to A which it had previously granted to Earl Granville, the grant in 1768 was void; and as the state succeeded upon the revolution to Earl Granville's right to the land, a grant made by the state since, shall be preferred to the royal grant in 1768. *Den dem. Taylor v. Shufford*, 116.

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EVIDENCE :

1. Before parol evidence can be given of the contents of a paper alleged to be lost, such loss must be satisfactorily shown. The *declarations* of the administrator to the person into whose possession the paper was last traced, that he could not find the paper among those of his intestate, is not sufficient proof of the loss, where the administrator is living, and there is no obstacle to procuring his testimony. *Governor use Allen v. Barkley*, 20.
2. Parol evidence shall not be received to contradict an acknowledgment in a deed of the payment of the purchase money. *Spiers v. Clay's adm'r*, 22.
3. The record of a recovery against a *guardian* is not evidence against his *securities*, in an action brought by the plaintiff in that recovery against the securities, to subject them upon the guardian bond for the default of their principal. *M'Kellar et al. v. Howell et al.*, 34.
4. The record of a recovery by the creditor of an intestate against his administrator, is not evidence in a suit by the creditor against the securities of the administrator. *Chairman of Mecklenburg v. Clark et al.*, 43.
5. A discharge by a magistrate upon a warrant for a felony is *prima facie* evidence of the want of probable cause in an action brought by the defendant against the prosecutor for a malicious prosecution. In such action, the defendant may give in evidence in mitigation of damages, that *after* the prosecution instituted by him, the character of the plaintiff was bad, upon subjects unconnected with the felony for which he was prosecuted. *Bostic v. Rutherford*, 83.
6. Common reputation is evidence in questions of boundary ; and in ascertaining Earl Granville's line, astronomical observation is a more certain mode (the latitude of the line being given) than an actual running of the line from a certain point designated on the sea shore as its beginning. *Doe dem. Taylor v. Shufford*, 116.
7. Where a law suit is pending between two parties relative to the title of a vessel, and they enter into a parol agreement to settle all law suits and matters in controversy between them ; and afterwards the plaintiff in the law suit, instead of dismissing it, takes a judgment by default, and is thereupon sued on his breach of the contract of settlement ; in such suit either party may introduce parol evidence to show how his rights, as to the vessel, stood at the time of making the contract of settlement, because by so doing it would more satisfactorily appear whether those rights were taken into consideration in making the settlement. *Truitt v. Chaplin*, 178.
8. Proof of the hand-writing of a subscribing witness, under a *temporary* absence of the witness without a change of domicile, shall not be received, for it might lead to great abuses : but where a witness leaves the State in the exercise of a public duty (as in the case of a member of Congress) all presumption of collusion is repelled, and his hand-writing may be proved. *Selby v. Clark*, 265.
9. A Justice of the Peace of Granville County rendered a judgment in Franklin, in an action on the judgment, this fact may be proved, and the Justice is a competent witness. *Hamilton v. Wright et. al.*, 283.

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10. A record cannot be *prima facie* evidence ; where admissible at all the fact which it affirms cannot be contradicted ; where it affirms a fact *inter partes*, such affirmation is conclusive upon parties and privies ; where it affirms a fact in a case where no one was a party, it is evidence of that fact as to all persons alike. Where a suit was brought against three Justices of the Peace by an infant, for having appointed a guardian for him without taking any bond, the record of the County Court was offered in evidence by Plaintiff, showing that on a certain day of a certain term the Court was opened, the defendants being on the bench as Justices at the opening of the Court, and various orders were entered on the record, among the rest, the appointment of the guardian to plaintiff ; this record was offered as evidence that the defendants were the justices who made the appointment ; *Held*, that it is not *prima facie* evidence of the fact ; because a record, if evidence at all, is conclusive, it was evidence from which no inference of law is drawn, but it should have been left to the jury to draw from it the inference of fact that the defendants did make the appointment, if it would furnish them with any such inference. *Forster v. Dean et al.*, 299.
11. A judgment obtained against a deceased person during his lifetime, and a second judgment obtained thereon against his administrator, after his death, is both as to the administrator and his securities, evidence of a debt due by the intestate ; but it is not evidence against the securities that the administrator has or had *assets* to discharge it. But if the administrator has returned an inventory, such inventory is *prima facie* evidence against the securities of assets to that amount. *Chairman use Armistead v. Harramond*, 339.

EXECUTION :

1. A levy on *chattels* vests in the Sheriff a special property, and he may therefore sell after the return day of the writ, without a *ven. ex.*, but a levy on *land* gives to him neither property, nor a right of possession ; he has a naked authority to sell only ; his sale transfers a right of property to the purchaser, and without the consent of the tenant the Sheriff cannot give actual possession. Therefore, a sale by a Sheriff of real estate, after the return of a *fi. fa.* and without a new writ, is made without authority, and passes no title. It *seems* that a levy on real estate shown only by an endorsement on the writ, made after the return day, is not valid. *Doe dem. Barden v. M'Kinne*, 279.
2. The lien created by an execution is continued by an *alias* regularly issuing thereon ; and if execution, at the instance of another plaintiff, issue after the lien of the first commenced, and before execution is fully done under it, the *alias* come to the sheriff's hands, it shall have the preference. *Brasfield v. Whitaker*, 309.
3. A made a deed of trust to satisfy several creditors ; after this, part of the property is levied on and sold under execution : The sale passes nothing. A had not such an interest as could be levied on under our act of 1812, subjecting equitable interests to execution. *Brown v. Graves*, 342.
4. A was indebted to B and C. B obtained a judgment against A, and before execution issued, a negro, the only property of A, was sold by a Constable under an execution, when C purchased him for \$396, whereof he paid the Constable \$18, the amount of his execution, and by consent of A, retained the balance of his

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bid to satisfy the debt which A owed him as far as it was sufficient for that purpose. A bill filed by B against A, C, and the Constable, was dismissed. B had no lien on the negro, either in Law or Equity. *Selby, adm'r, v. Dixon et al.*, 424.

EXECUTORS AND ADMINISTRATORS :

1. When the plaintiffs in execution are administrators, who after a levy by the Sheriff suspended the proceedings under the execution, and subsequently received the money from the defendant without any sale by the Sheriff, they are liable to the Sheriff in an action for his commissions *individually* and not as administrators. *Matlock v. Gray et al.*, 1.
2. A purchase by an administrator enures solely to the benefit of the next of kin, and the slave purchased remains in the hands of the administrator after the sale upon the same trust as before. One marrying an administratrix is trustee of the intestate's property in the same manner as his wife was, especially if he have notice that it was the property of the intestate. *Falls et al. v. Torrence*, 412.

Vide *Evidence*, 11. *Trust*.

Lapse of time.

FALSE TOKENS :

Promissory notes are not public tokens of themselves ; bank notes are ; an indictment, therefore, for a cheat at common law, by passing certain "promissory notes" as and for bank notes, without an averment that they resembled bank notes, cannot be sustained. *State v. Patillo et al.*, 348.

FRAUD :

Vide *Judgment*, 1.

GRANT :

Vide *Estoppel*, 1.

HEIRS :

Vide *Construction*, 1. *Partition*, 1.

INDICTMENT :

Indictment against two for an affray in "mutually assaulting and fighting with each other." The defendants were found not guilty of an affray, but that the defendant A was guilty of an assault and battery upon B. the other defendant. Judgment on the conviction for an assault and battery may be pronounced. *State v. Allen et al.*, 356.

Vide *Bastard*, 1, 2. *False Tokens*, 1. *Justices*, 1.

INJUNCTION :

An injunction granted upon the payment of the money recovered at law, into the office of the Master, will not be dissolved, simply because obtained more than four months after the rendition of the judgment at law. The object of the act of 1800 on the subject of obtaining injunctions was to prevent delay and hazard to creditors, and this is accomplished by the terms imposed. *Pugh v. Maer et al.*, 362.

Vide *Equity*, 5.

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JUDGE'S CHARGE:

The charge of a Judge should be judged of by its general scope and spirit; hypercritical niceties are to be disregarded. When, therefore, in an action for an assault, the jury was told to imagine them selves placed in a situation similar to that of the plaintiff, and to give to the plaintiff such sum as they would be willing to take as a compensation for the injury; the language is not to be understood *literally*. It is to be considered as admonitory to the jury to regard not merely the wrong sustained by the plaintiff, but the provocation he had given, the effect produced on him, the ability of defendant to make compensation, and to estimate the damages from a view of all the circumstances. *Paschall v. Williams*, 292.

JUDGMENT:

A judgment fraudulently confessed to cover the property of the debtor, shall be postponed to a judgment obtained *bona fide* after such fraudulent confession.

JURISDICTION:

Where iron was left with one for a certain purpose, who after using part retained the remainder to his own use, a warrant cannot be brought, before a single magistrate, to recover the value of the iron retained; the act allowing warrants "for specific articles, whether due by obligation, note or assumpsit," does not embrace this case. Perjury cannot, therefore, be committed on the trial of the warrant before the magistrate. *State v. Alexander*, 182.

JURY:

An alien is not entitled to a jury *de medietate linguæ*, in North Carolina. *State v. Antonio*, 200.

JUSTICES:

The Justices of a County Court are not obliged, by their own exertions, to build and repair jails; they are only bound to use such means for the accomplishment of that end as the law prescribes—*i. e.*, to lay a tax, appoint commissioners to contract, a treasurer of public buildings, &c.; and for an omission of one or all these acts, *it seems*, they may be indicted jointly as a body: but the indictment must charge which of the duties prescribed by the act has been neglected: it is not sufficient to charge generally that they negligently and unlawfully did permit the jail to go to ruin and decay. *State v. Justices of Lenoir*, 194.

JUSTICES' JUDGMENT:

Justices' judgments are not records, and do not prove themselves; they resemble records in one particular, *viz.*: their merits are not examinable in an original suit, and assumpsit will not, therefore, lie on such judgments. *Hamilton v. Wright et al.*, 283.

LANDS:

The injury arising to adjacent lands, by the overflowing of a mill pond, is a tort; although the statute has given a new remedy for it, it has not altered its nature. *Wilson v. Myers*, 73.

LAPSE OF TIME:

1. When a bill is filed to surcharge and falsify an account stated nineteen years before, the delay must be well accounted for, to [383].

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repel the presumption arising from this acquiescence. For this purpose, it is not enough that the mistake sought to be rectified was discovered within a few months previous to exhibiting the bill, but it should appear why the discovery was not sooner made. *Bruce et al. v. Child et al.*, 372.

2. The claim of the next of kin to distribution of property purchased by the administrator at his own sale, is not affected by the statute of limitations, being the case of a trust to which the statute has no application. In such case time is not a bar, but a circumstance from which a presumption may arise that the demand has been settled by payment or otherwise. A great lapse of time affords a strong presumption, but such presumption may be rebutted by facts explanatory of the delay, and though the Court will not encourage claims brought forward after a great efflux of time, but will presume against them, yet where the delay is satisfactorily explained and the presumption of satisfaction sufficiently removed, the equity of the claimant remains unaffected, and the Court will decree for him, notwithstanding the great lapse of time. *Falls et al. v. Torrence*, 412.
3. In regard to time, equity acts by analogy to statute law or to common law, and time has the same effect as at law in the analogous case. Where the statute applies, time is a positive bar, may be pleaded, or is the ground of demurrer, and the right can only be saved by the same exceptions as at law have that effect. *Ib.*
4. *It seems* that equities of redemption and constructive trusts are cases in which equity acts as analogy to the statute, and time should be a bar in itself, according to the recent decisions in England. But when the rule as to time was adopted in this State, in such cases, equity was supposed to act in analogy to the common law. Hence, the time adopted was twenty years, and hence, also, it was considered as only affording a presumption of fact, and not as a positive bar. Though this notion was incorrect, and properly seven years is the period and should be a bar, in analogy to our statute of limitations, yet the notion has been so long adopted—is supported by such a train of decisions, and so much property depends upon it, that it is now too late to disturb it. *Ib.*
5. In cases of direct or pure trusts, time has no influence. The estate of the trustee is that which supports the trust, and without which it could not exist, and his possession operates for the benefit of the *cestui que trust*. The trustee cannot, by any act of his, make his estate and possession adverse to the *cestui que trust*. The trust owes its existence to agreement, and it requires the consent of the parties to destroy it. Therefore, if the trustee be guilty of wrongful conduct, he does not cease thereby to be a trustee, and of the same kind of trust as before such conduct—but it is at the election of the *cestui que trust* to consider the trust at an end (if he please) and treat the trustee as a wrong-doer. *Ib.*

LEGACY :

As to personal property, a residuary clause not only carries all not disposed of, but every thing that in the event turns out not to be disposed of. *Taylor, ex'or, v. Lucas et al.*, 215.

LEVY :

Vide *Execution*, 1, 3.

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LIEN :

The purchase money of land unpaid, is a lien on the land where no conveyance has been made of it, unless there is evidence that the land was not looked to, or such lien has been abandoned. When, therefore, A purchased real estate, and a conveyance was to be made when the purchase money was paid, the vendor has a lien on the land for the purchase money ; and A having afterwards mortgaged the premises to B, and B having paid the purchase money, he may *tack* the money paid to the sum due on the mortgage ; for the payment is for A's benefit, it discharges the lien, and enables him to demand the legal title. *Henderson v. Stuart*, 256.

Vide *Execution*, 2, 4.

LIMITATIONS :

Vide *Warranty*, 3. *Lapse of time—Pleas and Pleadings*, 1.

MALICIOUS PROSECUTION :

Vide *Evidence*, 5.

MANSLAUGHTER :

Under the act of 1816, *ch.* 20, corporal punishment and imprisonment cannot both be inflicted on a person found guilty of manslaughter. *State v. Yeates*, 187.

MILL POND :

Vide *Lands*, 1.

MORTGAGE :

Under ordinary circumstances, the purchaser from a mortgagee stands in his place, and must submit to a redemption on the same terms ; for though he may purchase for a large sum, and though he has the legal title, yet he has not equal equity with the mortgagor, for he buys *with notice* ; his title being on its face for the security of money, should put him on inquiry ; and any thing which puts one on inquiry is sufficient notice. There are cases, however, where a different rule prevails, as where the purchaser advances the money and takes a conveyance for the benefit of the mortgagor or his heirs, and not for his own benefit. But, as in this case, the defendant took an *absolute conveyance* to himself, and in his answer *denied* complainant's *right to redeem*, he must be viewed as a mere assignee of the mortgagee, and must submit to a redemption on the same terms, and is not entitled to the sum which he has actually advanced. *Henderson et al. v. Stuart et al.*, 256.

NEW TRIAL :

1. Where, upon a record and statement of the case sent to this Court, it appears that the charge of the Court was not applicable to the facts stated, a new trial must be granted ; for if there was no other evidence but that stated, the charge was irrelevant ; and if there was other evidence, it should form part of the case ; and in either event a new trial will be granted. *Finch's ex'r v. Elliot*, 61.
2. Where a Judge below is correct in his statement of a rule of law, but makes a misapplication of it, and it is obvious, from the finding, that the jury were led into no mistake thereby ; *it*

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seems that a new trial will not be granted because of such misapplication. *Doe dem. Tatem et al. v. Paine et al.*, 64.

3. If a release be offered in the course of a trial to render a witness competent, and is read without any objection made at the time as to the want of proof of its execution, by the subscribing witness, such objection shall not avail after verdict as a ground for a new trial. *Ibid*, 64.

Vide *Sheriff*, 2.

NUISANCE:

Vide *Equity*, 5.

PARDON:

The Governor cannot, constitutionally, add to or commute a punishment; but under the power of pardoning, he may remit part of a fine. *State v. Twitty*, 193.

PARTITION:

The act giving power to Courts of Equity to order sales of real estate for the purpose of partition, directs the proceeds to which infants are entitled, to be secured to such infant or his *real* representatives. Hence such share of the proceeds is to be considered as real estate, and (if the infant die before arriving at age) the heir at law will succeed to it, and not the personal representative. But if the infant arrive at full age and then die, whether the heir at law will be entitled, *quere?* *Heckstell and wife v. Powell*, 216.

PERJURY:

Vide *Jurisdiction*, 1.

PETITION FOR REHEARING:

Vide *Equity*, 6.

PLEAS AND PLEADING:

1. To an action on a sheriff's bond, the plea was, the act of 1810, barring suits on such bonds, if not commenced within six years after the right of action accrues; replication, a promise within three years. The replication is a departure from the declaration; for though the party promising may be liable in an action on the promise, yet the promise cannot restore the right of action on the bond; for to that, by the express words of the statute, lapse of time is a positive bar. *Governor v. Hanrahan*, 44.
2. A variance between the writ and declaration, the former being in debt, the latter in assumpsit, is fatal even *after verdict*. *Stamps v. Graves*, 102.
3. It is not proper to permit a special plea to be added after the jury is impanelled. *Hamilton v. Wright et al.*, 283.

Vide *Bills of Exchange*, 1. *Lands*, 1.

PRACTICE:

1. The act of 1824, ch. 3, giving to the Supreme Court the power of amending, extends only to such amendments as the Court below might have made; and *it seems* no *substantial* amendment will be allowed in the Supreme Court, because on such amendment, the other party should have leave to amend his pleadings, and

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thus new issues are made which there is no tribunal to try. *Matlock v. Gray et al.*, 1.

2. The distributees of A filed a petition against the administrator of A, and charged in the petition that B, one of the children of A, had been advanced by his father in his life time, and made him a defendant in the petition. In the County Court, a jury found that B had been advanced: B removed the proceedings by *certiorari* to the Superior Court, where, after reference to the Clerk of the matters of account, the suit as to the petitioners was settled and disposed of; and so much of the case as related to the advancement of B was referred to arbitrators, who decided that B was entitled to receive a certain portion of his father's estate; and when this award was returned, on motion judgment was rendered for the sum stated to be due, in favour of B against the administrator, without objection:—*Held*, that the circumstances under which the judgment was rendered were such as made the judgment substantially just, as much so as if B had been one of the petitioners instead of a defendant; and as B had issued a *sci. fa.* to the administrator on this judgment, if the administrator had any substantial plea he might urge it against the *sci. fa.* *Dozier v. Ex'r of Simmons*, 26.
3. A petition was filed against several defendants, complaining of an injury done to lands by a mill pond; a trial was had and verdict taken for the petitioner, and judgment against all the defendants: one of the defendants was dead at the time of judgment, and a writ of error was brought for this error in fact. On the return of the writ, a motion was made below to amend by suggestion of the death *nunc pro tunc*, &c. The motion was allowed on payment of costs, and the writ of error dismissed. On appeal to this Court—*Held*, that the amendment had been properly allowed, for it would have been at the trial a matter of course. *Wilson v. Myers et al.*, 73.
4. Where a plaintiff sued out twenty-one warrants on twenty-one notes, amounting in all to one hundred and four dollars, in cases where the causes of action were the same, and the defence was the same in all, the Court compelled plaintiff to consolidate. *Person v. State Bank*, 294.

Vide *Injunction*, 1. *Pleas and Pleadings*, 3. *Equity*, 3, 4, 6, 7. *New Trial*, 1, 2, 3. *Sheriff*, 2.

PROCESS :

A subpoena is good which is tested in a certain year of American Independence, though the year of our Lord is not named. *Goodman's adm'r v. Armistead*, 19.

PUNISHMENT :

Vide *Manslaughter*, 1.

RECORD :

Vide *Evidence*, 10. *Justices' Judgment*, 1.

REMAINDER :

Vide *Devise*, 1.

SHERIFF'S BOND :

Vide *Pleas and Pleading*, 1.

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SHERIFF'S RETURN :

Vide *Sheriff*, 2.

SHERIFF :

1. When a Sheriff levies and advertises for sale, but in consequence of the payment of the debt to the plaintiff by the defendant in execution, does not actually sell, he is nevertheless entitled to his commissions on the whole debt, under the act of 1784. *Matlock v. Gray et al.*, 1.
2. The return of a Sheriff of the service of a writ is made upon oath, and cannot be contradicted by the defendant's affidavit that the writ was not served. When, however, a defendant, against whom a judgment by default had been rendered, obtained a *certiorari*, and swore that the writ had never been served, and *that he had a good defence*, the *certiorari* will not be dismissed, but a new trial shall be had. *Hunter v. Kirk*, 277.

SLANDER :

It is not actionable to charge a man with burning an out-house not parcel of the dwelling-house. *Brady v. Wilson*, 93.

SUBPOENA :

Vide *Process*, 1.

TENANT IN TAIL :

Vide *Warranty*, 2.

TRUST :

Vide *Execution*, 3. *Executor and Administrator*, 2. *Lapse of time*, 2, 3, 4, 5.

VARIANCE :

Vide *Pleas and Pleadings*, 2.

WARRANTY :

1. These words are formed in a deed of *bargain and sale*, viz : "Furthermore, I, the said M. H., for myself, my heirs, executors and administrators, do covenant and engage, the above demised premises, to him, the said J. H., his heirs and assigns, against the lawful claims or demands of any person or persons whatsoever, forever hereafter to warrant, secure and defend." *It seems* that this is a *personal* covenant, and not a warranty. *Doe dem. Gilliam v. Jacocks*, 310.
2. M. H., the grantor in the deed, was tenant in tail, and supposing the clause above cited to be a warranty, still no discontinuance of the estate tail is worked by reason of such warranty occurring in a deed of bargain and sale; nor is the heir in tail put to her *formedon*. *Quere*: Can the writ of *formedon* be now brought? *Ibid*.
3. The first heir in tail after the death of M. H., the grantor in the foregoing deed, when the right devolved on him was an infant, and died before the disability was removed, leaving an infant heir, who became covert before full age, and brought her action within three years after discovery; she is not barred by the statute of limitations—she comes within the saving of the act. *Ibid*.

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WILL:

A executed a paper writing in the form of a deed of trust, and afterwards on the same day made his will, referring to the former paper, the purpose of which was a distribution of his estate after death. D Y was one of the trustees named in the deed, and also one of the executors named in the will, and one of the only two subscribing witnesses to both papers. The trustees were directed by the first instrument to retain out of the funds a compensation for their trouble. The testator had both real and personal property, which his trustees and executors were directed to sell. After the death of A, D Y released all his claim to the other trustees. Whether the two papers are to be considered as one testamentary disposition. *Quere?*

2. The will is not well executed. D Y had such an interest in the lands devised as was contemplated by the act of 1784, and when such interest exists at the time of attestation, no subsequent release will avail. *Allison's ex'rs v. Allison*, 141.

Vide *Construction*, 1.

WITNESS:

The plaintiff was security for one G. The defendant, the administrator of the creditor, obtained judgments at law against the principal and surety in a joint action. Plaintiff filed his bill to be relieved against the judgment, on the ground that he was discharged in equity by the laches of the holder. G. is not a competent witness to prove the truth of plaintiff's bill. *Cannon v. Jones, adm'r*, 368.

Vide *Evidence*, 2. *Will*, 1.

WRIT:

Vide *Sheriff*, 9. *Process*, 1.

*This book must
not be taken
from the building*

